CASE AND COMMENT

Vol. 17 AUGUST, 1910 No. 3

# Melville W. Fuller

## Our Late Lamented Chief Justice

BY THE EDITOR

AT dawn, on the nation's natal day, Death summoned the kindly, faithful man who for twenty-two years has served with honor as Chief Justice of the United States. It is a solemn moment in the life of the Republic when one Chief Justice passes and another is to succeed him. The Chief Justiceship is an office equal in many respects to the Presidency itself. There have been Chief Justices who have wielded a greater influence over the destinies of every individual citizen than any President, save two or three alone.

Our ablest jurists have looked up to this post as the goal of their highest ambition. It is said that President Taft would have preferred the Chief Justiceship to the exalted position which he now occupies. The day before he was inaugurated as President he was asked if he had followed the usual custom, and provided a Bible on which the oath could be administered, and afterwards kept in the Taft family as a souvenir.

"No," he replied, meditatively, "I think I prefer to be sworn in on the Bible on which I would have taken the oath as Chief Justice had it fallen to me."

### Mr. Fuller's Appointment

This high honor came to Melville W. Fuller unsolicited. He was eminently quiet and dignified and would have thought it unfitting to seek preferment of that nature. But President Cleveland, who was a rare judge of men, knew him, and had theretofore offered him other appointments which he had declined. On the death of Chief Justice Waite, in 1888, President Cleveland promptly nominated Mr. Fuller for the vacant position. In accepting the place he gave up a law practice which netted him an annual income of $30,000. The salary attached to the Chief Justiceship was at that time $10,500.

### His Standing at the Bar

Mr. Fuller had practised law in Chicago for thirty-two years. He was a lawyer's lawyer, one whom lawyers loved to consult. A man of absolute probity, he possessed the complete confidence of every lawyer at the Chicago bar.

One who knew him well says of him: "The late Chief Justice had one singular characteristic. I never knew him to speak ill of anyone. Moreover, he was a forensic orator of talent, brilliant and attractive as a speaker. Possessing a fine literary style, an eloquent delivery and a pleasing address, he was for years the representative whom the Chicago bar thrust forward when it wanted to do itself proud on any occasion of especial importance. It was Fuller, I remember, who represented us when we gave an imposing banquet and reception to Lord Chief Justice Coleridge, upon his visit to Chicago in 1886 or 1887."

### His Manner and Appearance

Throughout his service, Chief Justice Fuller was noted for the dignity with which he filled the position. He preserved that manner when on the bench

or off it. Although small of stature, not more than 5 feet, 7 inches, his wealth of silvery hair and classic features made him a commanding figure wherever he appeared.

Behind the outward manifestation of the courtly gentleman, and the mild-mannered voice, which, in recent years, has been almost inaudible to those seated on the edge of the court room, was a tremendous force of character, a keen sense of justice and a capability for hard and persistent work wholly out of proportion to his years.

### Important Opinions Rendered by Him

Among the many important opinions he rendered were the unconstitutionality of the income tax; the decision in the Danbury hat case that labor unions are amenable to the Sherman anti-trust law; and the decision denying the right of the state to tax any telegraph messages but intrastate ones. He held that the claims of a widow and her children to the insurance on the life of the husband and father are distinguishable from other claims against the estate, on the ground that it is public policy that a man should provide for his wife and children; he denied the right of a railroad to exempt itself from liability for its negligence in the shipment of goods; he wrote the opinion in Leisy v. Hardin, holding that a state could not interfere with the importation of intoxicating liquors nor with their sale while in the original packages. Another case of importance that came before him involved the tariff policy toward the Philippine Islands. In this, the Chief Justice was with the minority, contending that to regard the Philippines as outside territory was unconstitutional. In the Northern Securities decision, the Chief Justice was again with the minority. The position he took was not unexpected, in view of his general attitude toward the recent enlargement of Federal authority in business affairs.

> ¶ "He was a great justice, and noted for his independence of thought and courage of action. His career entitled him to the gratitude of his fellow countrymen."
>
> —President Taft

### His Literary Style

When it fell to him to prepare the decision of the court, he showed himself master of a lucid style which sometimes had even a literary quality. One of the best illustrations of this was the opinion he handed down in the case of Hammond v. Hopkins. He concluded his opinion by saying: "In all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions, and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. The hourglass must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused."

### Delays Big Trust Cases

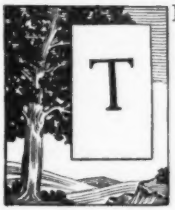
The death of Chief Justice Fuller means that the rehearing of the Standard Oil and Tobacco Trust and the Corporation Tax cases will be delayed a few months longer.

### Remaking the Supreme Court

Fate is hastening the fulfilment of one of the campaign claims of 1908, that the President then selected would have the task of remaking the Supreme Court. Never before has so swift a succession of calls been made upon the Chief Executive for appointments to the highest court. One third of its membership has gone to the Great Assize since Mr. Taft became President. Vitally important questions are now and will soon be before this court for decision, and never before has a President been called upon to exercise the appointive power in a manner so directly affecting the national welfare through the rulings of the court of last resort.

# Powers of Courts in Vacation

BY EDWIN S. OAKES



"THE division of the year into term and vacation," says Reeves, in his History of English Law (Vol. 1, p. 332), "has been the joint work of the church and necessity. The cultivation of the earth and the collection of its fruits necessarily require a time of leisure from all attendance on civil affairs; and the laws of the church had, at various times, assigned certain seasons of the year to an observance of religious peace, during which all legal strife was strictly interdicted. What remained of the year not disposed of in this manner was allowed for the administration of justice." Blackstone (Com. Book III., p. 275) similarly describes the terms as "those leisure seasons of the year which were not occupied by the great festivals or fasts, or which were not liable to the avocations of rural business." And he gives, on the authority of an earlier work (Spelman of the Terms), the following account of their origin: "Throughout all Christendom, in very early times, the whole year was one continual term for hearing and deciding causes. For the Christian magistrates, to distinguish themselves from the heathens, who were extremely superstitious in the observation of their *dies fasti et nefasti*, went into a contrary extreme, and administered justice upon all days alike. Till at length the church interposed and exempted certain holy seasons from being profaned by the tumult of forensic litigations. As, particularly, the time of Advent and Christmas, which gave rise to the winter vacation; the time of Lent and Easter, which created that in the spring; the time of Pentecost, which produced the third; and the long vacation between Midsummer and Michaelmas, which was allowed for the hay time and harvest. All Sundays, also, and some particular festivals, as the days of the purification, ascension, and some others, were included in the same prohibition; which was established by a canon of the church, A. D. 517, and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian Code."

That judicial business was restricted in England at an early day to certain seasons of the year is demonstrated by the Mirrour of Justices, a book compiled either in the last years of the thirteenth or the first of the fourteenth century, and purporting to be a memorial of the ancient laws of England, where it is said (Ch. III., § 8), "And note, there are three manner of times exempted from pleas, in which no parties sit in courts to give judgments, whereof two are by law, and the other at the will of the King." The two ordained by law are stated to be, first, the months of August and September, "which are assigned to gather in the fruits of corn," etc., and second, the feasts of the church and Sundays.

### Institution of Terms of Court

The repute of having instituted terms of court in England forms part of the apocryphal halo surrounding various of her earlier rulers. "The learned Selden," writing in 1614, and probably relying upon Polidore Virgil and Holingshed, concurs with them in ascribing it to William the Conqueror; but subsequent investigators agree that such a division of the juridical year was already an existing usage at the time of the Conquest. It was more probably, like other national institutions, of gradual growth than of adoption in a completed form. In Herbert's Antiquities of Inns of Court and Chancery (p. 156), mention is made of laws of Canute and Edward the Confessor (who seem to have captured most of the credit for whatever of law there was in those shadowy days), forbidding ordeal and oaths on feast days and ember days, and at certain holy seasons. The most exact ascription of the institution of terms which has come to hand

is in a case in the court of King's bench, in 1676, rather chaotically reported in 2 Rolle, 443, from the law French of which the writer ventures, somewhat temerariously, to render the following extract: "Dodridge, Justice: Terms were to give and distribute justice (and for this the omission of a term in continuance is a delay of justice), and their commencement was in the time of the Saxon Kings before the Conquest. Thus, in Lambert, in his Antiquities, there is an act of Parliament made by the Saxons, and, as I suppose, by Edgar, who entered the monastery, the which act is for ordinance of days juridical," etc., describing the terms. Further on in the report another speaker, who may be conjectured to have been the Chief Justice, says: "It is true that the terms were observed in the time of the Saxon kings, as they are at this day; and I have a little book called *Gulielmum Conquestoris,* written by a hand of the time of Henry III, and there the terms are described by the vacations, as you have described them by themselves. There it is said Christmas, Harvest, Lent, and Whitsuntide are free from suits and business of the law, the one to garner the harvest, the others to serve God."

### No Vacation in Chancery

The system of terms and vacations which governed the English law courts did not, however, apply to the court of chancery. This was probably due to the fact that the principal function of that court in its early days was the issuance of original writs, returnable in term time to the other courts, and not the trial of cases. Thus, in 21 Year Book, 4 Edw. 4, it appears that on account of a plague prevalent in London, the business of the King's bench and common pleas was, by royal writ, postponed to the term following; and it is stated that the exchequer did not sit for the trial of cases, but only for the purpose of transacting fiscal business, "and also the chancery was not adjourned, for the chancery is always open." In cases on its law, or, as it was sometimes termed, its petty-bag, side, and probably on its equity side, so far as the trial of causes was concerned, it accommodated itself to the usages of the other courts. An interesting discussion of the powers of chancery in vacation, in which Lord Eldon took part may be found in Crowley's Case, 2 Swanst. 1, Buck 264. The notion that "chancery is always open" is of some practical effect in this country in determining the powers at chambers of judges vested with general equity jurisdiction.

### Vacation and Term

In the United States, terms of court are sometimes controlled by legislative acts, and sometimes left to be fixed by the courts themselves, under power conferred by the legislature, as the exigencies of judicial business may require.

To speak of the powers of courts in vacation is, perhaps, to offend against preciseness. "There is no common-law court except in term time," an English judge has declared. Similarly, American courts have said: "In vacation the judge is not clothed with the character of a court;" and "It is only during term time that the judges are invested with their full judicial power." Such powers, then, as may be exercised by the judges of courts in vacation, must be conferred by constitutional or statutory provision, or be inherent in the office of judge.

An enumeration of the powers expressly conferred in the several states would here serve no useful end; but, while it is not purposed to enter upon a detailed discussion of the powers of judges in chambers, some account of such powers is germane to the present subject.

### Powers of Judges in Chambers or Vacation

The origin of these powers is not known. "By long-established usage," says Chitty (Practice, Vol. III., p. 19), "each of the judges of the courts of King's bench, common pleas, and exchequer, has, at common law, and independently of any legislative authority, at his chambers exercised a very extensive jurisdiction over certain minor and practical proceedings, especially irregularities that arise in conducting an action or defense, and this as well in the vacation as during the four terms. It would be difficult if not impracticable to trace the inception of this practice. It has been

observed that probably it originated either in the overflow of the business of the full court in term, or the expediency of certain matters, probably much, of course, though sometimes obstinately disputed by the parties, being decided upon or transacted before a single judge, as well to avoid the expense of formal rules, as to prevent the important time of the court in banc being consumed in disposing of trifling matters; and in the vacation, from the absolute necessity for some tribunal having power to interfere and relieve from the consequence of the abuse of the process of the court, or of irregularities, as by illegal arrest, or execution under illegal, irregular, or insufficient proceedings, under which otherwise a party might continue in imprisonment, or his goods be irretrievably sold under an execution, sometimes without any redress, or, at least, not otherwise redeemable until the next term."

While the powers so exercised are ordinarily regarded as belonging to the judges rather than the courts, they are on principle, according to the authority above quoted, an exercise of the authority of the court itself,—"an inceptive act of the court."

The authority of judges at chambers in term time and vacation is, in this country, usually defined by law; but instances are not wanting in which the courts have invoked ancient usage to sustain the exercise of customary powers. Such exercise, it has been held, is not curtailed by a constitutional provision that the judicial power of the state shall be vested in *courts,* upon the ground that such provision must have been framed with regard to existing methods of judicial administration.

It is the general rule that all judicial business must be transacted in term time; and when a law authorizes or contemplates the doing of a judicial act, it must be understood to mean that it is to be done by the court in term time. And while presumptions are often indulged in favor of the jurisdiction of courts of record, as such, the powers exercised by a judge in vacation are exceptional, and must find express authority in statute, or be such as have, from time immemorial, been recognized as inherent in the office of judge.

No power to perform judicial acts out of term time is conferred by a constitutional provision that the courts shall be always open. The interpretation generally put upon such a provision is that it means that the courts shall be open to business that may properly come before them at the time, in the order, at the place, and in the way prescribed, but not necessarily that such business shall be continuously transacted.

As has before been said, the power in vacation of courts in the various states, under statutory provisions, is a matter with which this article does not assume to deal. In view of the absolute powerlessness of the common-law courts to act as such out of term, the fact that the decisions relative to the powers of courts in vacation, aside from statutory powers, are largely of a negative character, will occasion no surprise.

### Trial of Cases and Rendition of Judgments or Decrees

Thus, it has been held that out of term time, during vacation, the justices have no power to meet as a court; and a judge cannot, by order made in vacation, reopen a term after final adjournment. The court cannot proceed in vacation with the trial of a cause; and although it is held in some states that it may do so with the consent of the parties, the view has been taken in others that such consent cannot confer jurisdiction.

A similar situation exists with respect to the rendition of judgments or decrees, or the granting of orders finally adjudicating the rights of parties, except as provided by statute. The decisions are unanimous in declaring that a judgment, being a judicial act, cannot be rendered after term time, at least, without consent, and if so rendered is a nullity; nor can a decree be made in vacation in an equity cause. However, the court may in vacation correct its minutes so as to make them speak the truth with reference to a judgment actually rendered by it at a term.

There is a decided difference of opinion as to the validity of a judgment or decree rendered in vacation by consent. The practice, even where held permissible, has been characterized as of doubtful expediency, and not ordinarily to be

encouraged, being out of the general course of proceeding and practice, and not infrequently giving rise to misapprehension, distrust, and confusion.

### Proceedings and Practice

The court cannot, in vacation, pass upon a demurrer to a complaint; or a motion to dismiss for want of equity; or determine a motion in arrest of judgment; or make an order vacating a judgment. It cannot, in the absence of statutory authority, grant a continuance; or make an order to subpœna witnesses for a defendant; nor can it grant temporary alimony. It cannot, without such authority, dissolve an injunction or discharge an attachment or garnishment, or deny a petition for a writ of mandamus.

It may not entertain proceedings for the revocation of letters of guardianship; and an attempt by a probate court in vacation to require an administrator to give further security has been held *coram non judice*.

It has been held, however, that a motion for nonsuit may be heard, and that an order recommitting a report of commissioners to lay out a highway may be made out of term, by consent of the parties interested.

A trial court has no jurisdiction during vacation over a motion for a new trial; but it is not necessary that the court be in actual session at the time such a motion is made.

It may not, during vacation, fix the time within which an appeal bond shall be given, or require plaintiff in error to give a new bond, or furnish additional security. Nor may it, out of term, amend a bill of exceptions; nor, where the statute provides that such an order be made by the "court," may the trial judge make an order to send up original documentary evidence to the appellate court.

A justice of an appellate court has, it seems, the power in vacation to make a provisional order for a stay of proceedings in the court below, pending decision of the appeal, so as to enable the party to make or renew, if need be, a similar motion in term.

It is within the general power of a court of equity to make a provisional appointment of a receiver in vacation; but this may not be done where a statute provides for the appointment of receivers by the "court."

A judge of a court open only at stated periods has no authority, in vacation, to punish refusal to obey an injunction as a contempt; but it has been held that where a judge is invested with power to award an injunction in vacation, the grant of power carries with it, as an incident, the power to punish contempt in disregarding it.

### Habeas Corpus, Prohibition, or Certiorari

The granting of the great remedial writs is largely regulated by statute. At common law, the court of chancery, being always open in its capacity of *officina justitiæ*, might issue them at any time. According to Lord Coke, the courts of King's bench and common pleas could grant the writ of habeas corpus only in term time; but in the opinion of Blackstone, as well as of Lord Eldon (see Crowley's Case, 2 Swanst. 1), such writ could issue out of the court of King's bench in vacation. The writ of prohibition may not be issued by a court of law out of term time; but, to avoid injustice, the practice is sometimes followed of issuing a rule to show cause, returnable at the following term, which will operate as a stay in the meantime. With respect to the writ of certiorari, the broad rule has been laid down that it "ought not to be granted in vacation, but in open court" (R. v. Eaton, 2 T. R. 89); but a contrary opinion has been expressed (Ludlow v. Ludlow, 4 N. J. Law, 387).

As the foregoing *résumé* demonstrates, the courts have shown no disposition to arrogate to themselves the power to exercise judicial functions at other than the times regularly appointed. The delays formerly arising from the circumstance that many proceedings in a cause could take place only in term time have been generally obviated by legislative enactment; and under modern systems of practice, public convenience suffers but little, while the handling of judicial business is considerably promoted, by the retention of the ancient division of the year into vacation and term.

# Laws Which Legislatures are Unfit to Make

BY BURDETT A. RICH

LEGISLATIVE power exceeds legislative capacity in some matters of large importance; that is to say, the legislatures have constitutional power to make laws on various subjects on which both reason and experience show that they cannot be trusted to legislate with proper intelligence or without improper influences. The truth of this statement in respect of some kinds of legislation is obvious, and the experience of more than a century has fully demonstrated it in some other matters. There are still many people, however, who appear to think that every attempt to provide a better method of determining any question within the broad scope of legislative power, however intricate or difficult it may be, than by majority vote of the members of the legislature, is an abandonment of the fundamental principles of our government. It may be worth while to review a little the reasoning of the matter and also the results of experience.

### Claims against State or Nation

The fitness of a legislature to decide a question of the justice of a claim against a state or nation might not be doubted by most people when the question was presented as an abstract one. Yet, as such a claim requires an essentially judicial determination, the fitness of the average member of the legislature to pass upon it can hardly be presumed. Under the old Constitution of New York, which made the state senate a part of the court of errors and appeals, it was abundantly demonstrated that, on questions of law, at least, state senators were unfit to be judges. On claims against a state, questions of fact, rather than of law, are usually presented, but these are often complex enough to require very minute, patient, and thorough investigation. The members of the legislature, as a body, even if they are capable of making such an investigation, never will do it. In fact, to do it would usually require an amount of time which it is impossible for them to give. Aside from the incompetence or indifference or lack of time which prevents legislatures from acting intelligently and justly on these claims, even when they act at all, has been the fact that it has been often, if not usually, impossible, to get them to act at all on a claim, however just, except by long persistence and lobbying. Without assuming corrupt motives on the part of most of the legislatures, they have too many other interests engaging their attention to be ready to take up claims of private individuals unless they are forced upon their attention in a way that practically compels action. As was said in these columns many years ago: "Real tragedies might be written from the lives of men whose long pursuit of a congressional award started with faith in the nation's honor, and ended with a bitter sense of the nation's dishonor. If the claim were finally allowed, the claimant might have already passed to another tribunal, where justice can be got without the service of a lobbyist." (5 Case and Comment, 27.) Speaking on the same subject a little later, the president of the American Bar Association said: "The government of the United States is the most cruel and rapacious creditor and the most dishonest debtor in this country. If a man has a claim against the government which needs the kindness of Congress, he had better destroy all evidence of the debt, so that future generations may not be distressed and made bankrupt in an effort to collect the claim." To add to the bitterness of the sense of injustice of those whose

just claims are ignored through many years of patient and persistent pleading for redress, the claims that have been successful have often been allowed only by the aid of a powerful lobby and large expenditure of money. During the whole history of our government, the treatment of claimants by Congress has made a shameful story of scandals and injustice.

Slowly and by degrees the nation and the states have been working away from this disgraceful state of affairs. Many years ago the Federal government established a court of claims, and some of the states have done the same. But there are many claims yet, especially claims for torts against state or nation, on which no justice can be done to the claimant except by special legislative favor. With more than a century of injustice and dishonor in the treatment of those who have just claims, and of scandals in the allowance of claims put through by lobbyists, it is time that our tribunals for claims had jurisdiction ample enough to cover every form of just claim, whether for tort or otherwise. The composition and unwieldy size of legislative bodies are enough to show their unfitness for judicially determining the justice of claims presented. But, if there were any doubt about that, actual experience has demonstrated beyond question that to leave these claims to legislative action is to deny justice to many honest claimants, and make the allowance of a claim depend not upon its justice, but upon the strength of the lobby that pushes it.

### Regulation of Rates

The regulation of rates of public service corporations is another illustration of those questions which legislatures are altogether unfit to determine. The justice of a certain rate for fare or freight on a railroad, or for the use of a telegraph or telephone, is a matter that, in the nature of things, can be determined intelligently and justly only after the most careful judicial analysis of the principles that must govern, and, at the same time, the most extensive and accurate analysis and computation of a great mass of facts. Such a question is one that demands uncommon ability and an extraordinarily extensive and thorough investigation of the facts. No other class of questions has presented greater difficulties to our judges. Yet many a legislature has undertaken to pass sweeping laws on this subject with no other knowledge on the part of most of the members voting than that common knowledge which belongs to all members of the community. The constitutional power of the legislatures to enact laws on this subject is beyond dispute so long as the restrictions do not amount to a confiscation of property, or a deprivation of it without due process of law. But the fitness of any legislature to decide such a question is obviously lacking. If there were no other way of dealing with such a subject, it might be necessary for the legislatures to act as wisely as they could, and leave the justice of the legislation to be determined by the courts; but this amounts to deciding by guess and throwing the problem on the courts. Certainly no one would contend that the average member of any legislature has or possibly can have any such knowledge of the intricate questions and intricate facts involved in the problem as enables him to determine judicially whether certain rates of a public service company are just. Neither will anyone contend that the members of the legislature, even if they have the ability, can, by any possibility, have the time to make such exhaustive investigation of those intricate matters as to enable them to judge the question intelligently. These questions, therefore, are, beyond dispute, outside the proper range of legislative action, though they are unquestionably within the constitutional range of legislative power. Little by little the conviction of this truth has been forcing itself on the people, with the result of establishing the Interstate Commerce Commission and the various public service commissions, railroad commissions, etc., in the various states. The movement for these commissions has been obviously in the way of experiment, and has been developing gradually and against some opposition. How much they may still need to be modified and improved may still be open to question. But no one can deny the reasonableness, and, in fact, the necessity, if justice is to be done, of substituting as judges of

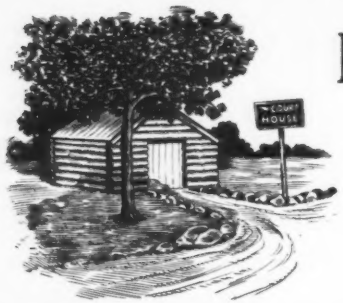
these intricate and complex questions men of exceptional ability and training, who shall make it their business first to investigate and then to determine them, instead of leaving them to a mere majority vote of an unwieldy body of men with no training and with no time, even if they have the ability to investigate before deciding.

### Tariff Legislation

The establishment of a tariff commission is another movement to relieve legislative bodies of duties which they are unfit to perform. Admitting that the tariff is a political question in its broadest sense, and not one of a judicial character, and therefore that the policy with respect to a tariff is to be settled by legislative action, it is, nevertheless, obvious that the determination of the exact rate of tariff on the multitude of specific articles imported should be impartially determined by the application of some general policy or rule of action in the light of the fullest investigation of facts in each particular case. That investigation obviously cannot be made by each member of Congress. Neither can it be made by any member of Congress for himself, however diligently he may apply himself to it, not only during the term of Congress, but in all the intervals between terms. Practically, the knowledge of the multitudinous facts that ought to be considered in making a tariff is entirely beyond the possible range of a legislative body, unless it is provided by exhaustive work by expert investigators. A tariff commission or some similar body must settle as far as possible beyond dispute all the facts that need to be considered. This is undeniably the first requisite of any fair and honest tariff legislation which shall faithfully adjust the various tariffs according to any policy adopted. But lack of knowledge is not the only or chief hindrance to proper tariff legislation by Congress. Every member of that body has friends and constituents who are vitally interested in the tariff rates on certain special commodities. They expect him to work for their interests. His whole district may be united in such demands. His own political life depends on his serving them. It is idle to expect him to vote against the wish of his district. The result is that all the Congressmen, whether from a sense of loyalty to their own constituents, or to preserve their own political life, vote primarily as representatives of their own districts, and not as national representatives. To get what he wants for his district, each has to vote for many things that he does not want, but which the representatives of other districts do want, and thus what has been picturesquely known all through our legislative history as "logrolling" comes to be the real process of legislation in this class of cases. It is obvious to everyone that such a method of making a tariff law is to a large extent, a compromise of conflicting special interests. It might almost be called a conspiracy among them against the public at large, except for the fact that those specially interested in demanding exorbitant tariffs often persuade themselves that they are for the benefit of the public at large. The law is the result of scrambling. If a competent commission investigates and establishes the essential facts, and Congress determines some rule of policy to apply to them, it will be possible to enact a tariff that shall honestly represent a principle and be made in a businesslike way.

### Appropriations

There are various other matters of legislation which also should be dealt with by our legislative bodies, if at all, only after all disputed questions involved have been determined by men with adequate opportunity to investigate them and fully competent to determine them. To mention a single other instance, the whole matter of appropriations, whether by Congress or state legislature, has long been a reproach because of the vast sums of money wasted by legislatures under the system of logrolling. The contemptuous name of "pork barrel," long ago given to such a bill, illustrates the universal feeling of the public with respect to the methods and motives which control in the enactment of such laws. On these and similar subjects, the business sense of the people of the country will more clearly see the unfitness of legislative bodies to deal with the subject in the old-fashioned way, and will demand a better system.




# Log Cabin Courts of Long Ago

BY DAVID C. BAKER

Illustration By EDWARD J. DAVIS

IN the days of which I write, the judicial system, like the country, was in its infancy. The circuit court was composed of a president judge, elected by the legislature, and who presided at all the courts in the circuit, and two associate judges, elected in each county by the people. The president judge was always a lawyer of some experience. The associate judges were not lawyers, and they made no claims to legal knowledge. As a rule, they were typical representatives of the backwoodsmen, and very illiterate, yet, they had the power to override the presiding judge and give the opinion of the court, and they often did so. In such instances, their reasoning was likely to be of a most ludicrous character. However, they made up in honesty what they lacked in other directions, and the results were not as bad as might be imagined. They were usually elected because of their popularity and their well-known integrity, and though they occasionally went wrong, their constituents did not strongly censure them because of their mistakes.

Lincoln told a story of such a judge in the early history of Illinois. He had long been issuing marriage licenses, without authority, of course. One day he was told that he had no right to do so. He insisted that he had, and after much argument proposed to leave the question to Lincoln. They went to the latter's office, and the facts were stated. "No, Uncle Billy, you have no right to issue marriage licenses," said Lincoln. "Abe," replied the judge, "I thought you were a lawyer, but now I know you are not. I have been doing it right along."

### Clerks of Pioneer Courts

The clerks of the pioneer courts were seldom qualified for their duties, and many old-time records are the living proofs of this statement. They were uneducated and some of them barely had the ability to scrawl their own names, yet, they did not lack native shrewdness. There was a clerk in one of the pioneer settlements of central Indiana who boasted of his superior qualifications by declaring that he had been sued on every section of the statute, and therefore knew the law, while his opponent had never been sued, and therefore could not know the law. He was elected on this platform.

### Old-Time Sheriffs

The sheriffs were chosen by the people, and the man who could send his voice farthest in the woods, from the courthouse door, was often the successful candidate. A stentorian voice, physical strength, and tried courage, were the principal qualifications for this important office. When the court desired the presence of John Smith as a petit juror, or as a witness, it was the sheriff's duty to stand outside the courthouse, or poke his head out of a window, and cry three times and with all the power of his lungs, "John Smith, come to court," and John generally heard the call and obeyed. If he happened to be so remote that he did not hear, there were always plenty of loiterers who esteemed it an honor to go after him. A written summons was seldom resorted to. It was regarded as a waste of material and time, to say nothing of the stupendous task which the preparation of such a document would place upon a clerk who could hold a plow handle or a rifle barrel much more effectively than a pen.

### Ancient Records

But all clerks were not of this pattern. In some of the courthouses of the West, or central West, are to be seen records, more than a century old, which are beautiful specimens of the penman's art. Many of them are more legible than records written within the last dozen years. The old-time, competent record writer took great pains in his work. He often made his own ink, a strong nutgall and iron decoction, and he used no blotter. All the ink that he spread upon a page remained there, and soaked in, and now, after the passing of a century or more, no chemist on earth can remove it without destroying the paper upon which it is written. Within recent years the United States government officials have complained that while its modern records have faded, some of them being almost illegible, its records a century and more old are as plain as ever. A public official who permits the use of the blotter upon important public records which are intended to be permanent is derelict in his duty to future generations. The only writing fluid fit for permanent record purposes is an iron-tannic ink. It is the only ink that is lasting, and public officials should permit the use of no other.

### The Bar

The judges and clerks and the sheriffs were important functionaries in the courts, but by far the most important men who attended the sessions of the courts were the lawyers, especially the younger ones. But nobody called them lawyers. They were squires. To see a young squire with a queue 3 feet long dangling down his back and tied with an eel skin, strutting backward and forward over the rough hewn slabs that formed the floor of the ordinary log courthouse, brought the woodsmen from near and far; and to hear him "plead" was worth a wearisome foot journey over ice and snow, across swollen rivers and creeks, through an interminable forest.

### Politics of Long Ago

If the young lawyer had no business in the court, he mixed among the people about the courthouse, and sounded their minds as to his prospects as a candidate for the legislature, or any other office that he might have in view. Those were the days of no caucuses and no conventions. Every candidate brought himself out, and ran upon his own hook. If he was defeated, and most of them were, he had nobody to blame but himself.

There must have been lots of fun in politics in the good old times. Our modern party organizations, dominated by political machines, were unknown, and everybody could run for office. As a rule, the settlements were divided between admirers of General Jackson and Henry Clay, and a candidate's loyalty to the one or the other of those great men was the prominent feature of almost every political battle. This fact is best illustrated by a story.

On one occasion, a bright young lawyer, Oliver H. Smith, a candidate for Congress, had spoken more than two hours at a battalion muster in Ripley county, Indiana. In front of him, leaning against a tree, was an old man, who listened attentively to his discourse. When Smith closed, his hearer roared out:

"Mr. Smith, you have made one of the best speeches I ever heard, and I agree with all you have said. Will you answer me one question before you leave the platform?" Mr. Smith said he would.

"Will you vote for General Jackson?"

"No, sir, I shall vote for Henry Clay," answered Smith.

"Then you can't get my vote," was the old fellow's ultimatum. The question with the old man, and he was a type, was not between Smith and his competitor, but between Jackson and Clay.

### The Courthouses

The courthouses were mostly log buildings with puncheon floors and clapboard roofs that always leaked in the wrong place. There was a door in one end, and maybe a small window on the side. The furnishings were rudely simple. There was a bench, without back, for the judges, who sat upon a platform sufficiently elevated to permit them to have a clear view of the room. There

were similarly constructed benches for the lawyers, witnesses, and jurors, and maybe a few benches for the spectators. The clerk had a rough table, and there was a pen for prisoners. Off the court room was usually a small room, used by the grand jury. Spectators were separated from the court and bar by a long hickory or ash pole, supported at each end by wythes of hickory bark. If the building boasted a stove instead of a fireplace, it was placed in the center of the room, so that every corner was equally heated.

But what was done in those rude and simple log buildings was on the square. Nobody ever questioned the honesty of the judges who presided in them, though it is possible an unpopular decision might have led to wordy warfare and some picturesque profanity which the "side judges" could be relied upon to repay in kind.

### Making Business for the Court

I once met an aged man who told me that so much did the people of some of the near counties figure upon the periodical coming of the court, that they would deliberately make unnecessary litigation rather than face the prospect of no session, because of no cases for the court to hear. The establishment of a court in a new community seemed to develop litigation which would never have been thought of had the court not come. Men acquired what might be described as a litigious itch, and went to law upon the smallest provocation. A neighbor might have another neighbor arrested, not because he had injured him, or that he was an enemy, but for the sole purpose of keeping the court as long as possible, and to supply the young lawyers with something to "plead" about. A pioneer has been known cheerfully to give up a sow and her litter of pigs to secure money to pay the costs in an unnecessary and insignificant case, and to fee a young squire to the extent of two or three dollars.

Between sessions of the court, the inhabitants consumed a great amount of time discussing amongst themselves what the last session had done, and what the next session probably would do. They were partisans of the different lawyers who rode the circuit. They often heatedly compared their abilities, and their extreme loyalty to one or the other not infrequently resulted in rough and tumble fights in which gouging, biting, and kicking were not barred. This made more work for the squires.

### Suits for Slander

Judging from the number and variety of suits for slander docketed in some of the pioneer courts, one had to be extremely careful what he said about another, if he cared to avoid a suit.

The story of a single suit, one which aroused the interest of politicians all over the country, will sufficiently bear out the foregoing statement.

The scene of the trial was Franklin county, Indiana, which was mostly settled by men and women who had been reared in the woods of Kentucky. The parties to the suit were Josiah Harlan, plaintiff, and John Allen, defendant. The cause of the suit was the declaration by Allen that Harlan was a "d—d old Federalist." The plaintiff claimed that to be called a "d—d old Federalist" was scandalous and libelous; and that the charge that he was such had brought him into public disgrace, and his neighbors had since refused to have anything to do with him. The counsel for the defendant demurred to the declaration, insisting that to call a man a Federalist was not libelous, and not actionable. The case was heard by the associate judges, the presiding judge being absent. The demurrer was overruled, the defendant entered a plea of "not guilty," and a jury was impaneled. Great difficulty was found in securing a jury, because most everybody in the county had formed an opinion. But a jury was finally secured.

When the examination of witnesses began, the court room was crowded with an excited audience. It was evident that its sympathy was all on one side, and as jurors in those days, more than now, generally sympathized with the spectators in feelings, the result was not hard to anticipate. The plaintiff's witnesses, thirty in number, were sworn at one time. As they arose, it was said, they resembled the men who composed Falstaff's company.

"We will examine Mr. Herndon first," said General James Noble, leading counsel for the plaintiff.

Mr. Herndon, seventy years old, born in the woods of Kentucky, and who removed to the territory of Indiana before George Rogers Clark's army marched upon Post Vincent, now Vincennes, took the witness stand.

"Mr. Herndon, do you consider it libelous and slanderous to call a man a Federalist?" asked General Noble.

"I do," the old man answered.

"Which would you rather a man would call you, a Federalist or a horse thief?"

"I would shoot him if he called me one or the other."

"You have not answered the question," said General Noble.

"Well," replied Herndon, "I would rather be called anything under the heavens than a Federalist."

"What damages would you say the defendant should be made to pay for this libel in calling the plaintiff a Federalist?"

"I would say a thousand dollars at least."

Judge John H. Test, attorney for the defendant, then took the witness.

"Mr. Herndon," he asked, "What do you understand by a Federalist?"

"My understanding is that it means a Tory, an enemy to his country," the witness replied.

"Is that the common acceptation of the term?"

"Yes, I have never heard any other from the first settlements in Kentucky up to the present time."

General Noble again took the witness, and asked him one more question.

"Mr. Herndon, would you feel safe, with a Federalist by your side, to meet the Indians in a bush fight?"

"I would not. I would just as lief have one of the hostile Indians with his rifle and tomahawk by my side."

There was a brief conference between the opposing attorneys, then General Noble arose and said:

"May it please the court, we have twenty-nine other witnesses that we are ready to examine, but to save time, it is agreed by counsel that they will each swear to the same facts as those stated by Mr. Herndon, and that the publication of the libel is admitted."

No evidence was offered for the defendant. Lengthy speeches were made by the counsel on both sides, covering in their range the history of the general government from its organization; with Washington at its head; the election of Jefferson over Adams; the close and exciting contest between Jefferson and Aaron Burr; the Articles of Confederation; the adoption of the Constitution; the Cunningham correspondence; the visit of the citizen Genet to the United States; the alien, sedition, and gag laws; the impeachment of Judge Chase; and the examination of Aaron Burr for treason, before Justice Marshall. It was after midnight when the speeches closed and the jury retired. The charge was given the next morning. The court room was packed by the same crowd of excited people. The jurors took their places in the box, and one of the associate judges addressed them:

"Gentlemen of the jury, this is an important case. You are the judges of the law and the fact. This court do not feel authorized to invade the province of the jury; the whole case is with you." The jury retired and in a few minutes returned into court with the following verdict:

"We find that to charge a man with being a Federalist is libelous, and we assess the damages of the plaintiff at one thousand dollars, the amount sworn to by Mr. Herndon, and would have been by the other twenty-nine witnesses that were not examined, as was admitted by the counsel."

"The court are well satisfied with your verdict," said the associate judge. "You are discharged to get your dinners, as you have not yet had your breakfasts."

In one of the new settlements of Kentucky, a man named Green accused his neighbor of stealing his hogs, which had run wild in the woods. He was sued for slander, employed a young lawyer named Smith to defend him, and when the case was called for trial he was in a fighting state from whisky.

The plaintiff's witnesses proved that Green had used words equivalent to those in the bill of indictment, but not the exact words. The evidence closed, the lawyer for the plaintiff addressed the jury at great length, winding up with

the quotation from Shakespeare, "He who steals my purse steals trash, but he who filches from me my good name," etc. The court room was in a little log cabin with only one window and a pane of glass was out of the lower sash of that. Mr. Smith, the defendant's attorney, arose, with his back to the window, and began his address in a loud voice:

"Gentlemen of the jury, the court will tell you that proof of equivalent words will not do. You must find for the defendant. There is no proof that he ever spoke the words." He here paused for a moment, and the instant his voice ceased, Green, who was plainly drunk, and on the outside of the cabin, poked his head through the vacant place in the window, and yelled at the top of his voice:

"Smith, don't lie. I did say he stole my hogs and I will never deny it."

The young attorney, addressing the judge, said:

"I do wish the court would send my client to jail. He has been drunk and crazy ever since this case was docketed against him."

Upon the judge's order the sheriff arrested Green after an hour's chase through the surrounding woods, and locked him up until the trial was over. Smith won the case, and had his client discharged from jail without having to resort to a writ of habeas corpus.

But the end was not yet. Green met the plaintiff the next day, pulled his nose and slapped his face. He was indicted for assault and battery.

The trial day came. The log cabin court room was crowded, and Smith again appeared for the defense. The two associate judges were on the bench. The evidence all in, Smith arose and began:

"If the court please—"

He was here interrupted by one of the judges,

"Yes, we do please. Go to the bottom of the case, young man. The people are here to hear the lawyers plead."

Encouraged by this extreme kindness of one of the trial judges, the young lawyer waded into his task, and for three hours spoke concerning the terrible provocation his client had received to induce him to bound over legal barriers and pull the plaintiff's nose. It was a tremendous effort, and when he closed, the same kind judge sprang to his feet, waved his arms, clapped his hands, and shouted:

"Capital, capital, young fellow, I didn't think it was in you."

Is it necessary to add that Smith's client was acquitted?

### Tact versus Learning

Much learning was not always a good thing for a lawyer practising in the new settlements, unless it was accompanied with good, hard, common sense. To exploit knowledge of the classics in a court presided over by a couple of associate judges who were usually rough woodsmen was worse than useless. I will again illustrate. The evidence in a certain case was all in, and the arguments began. On the one side was a newcomer in the country, armed with Latin, Greek, Hebrew, and an infinite variety of classical knowledge, all topped off with a beautifully ornamented diploma decorated with blue ribbon and a seal,—the output of old Yale. On the other side was a lawyer who had been reared in the backwoods, educated between times in a fifteen by twenty log schoolhouse in Kentucky, and armed with a large amount of common sense. Before the graduate of Yale lay an array of the old books, Coke on Littleton, Blackstone's Commentaries, Woods' Institutes, Jacobs' Law Dictionary, and many others. Thus prepared, the learned counsel advanced boldly to his task, with a confidence born of self-admiration. His argument consumed the entire day, greatly annoying the court, who understood very little of it. The next morning, the Kentucky lawyer spoke. He began:

"If the court please, I shall not attempt to follow the learned gentleman, in his long speech, nor even to read and comment on his authorities. They may all be well enough in the right place, in their proper jurisdiction; but they have no bearing whatever in this court, in this jurisdiction. I have in my hand a little book from which I will read a few extracts,—just a few."

"What book is that?" asked the court.

"It is only the Declaration of Independence," was the answer.

"Well, that is coming to the point, read it," said the court.

The lawyer read: "When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another," etc., and "We, therefore, the representatives of the United States of America, in Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these United Colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British Crown; and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved." Here he ceased reading.

"That is conclusive," said the court. "These British authorities were all cut off on the 4th day of July, 1776. Judgment for the defendant."

The young lawyer from Yale profited by his experience, and in after years became one of the noted lawyers of the western country. The log cabin courts were a rough school, but they served to train many able and eloquent lawyers, whose doings and sayings are still treasured among the legends of the border days of long ago.

# A Graceful Valedictory

Judge John F. Philips, who was recently succeeded on the bench of the United States district court for the western district of Missouri by Honorable Arba S. Van Valkenburgh, uttered the following graceful valedictory at the time he relinquished office: "There is an immutable law of nature," he said, "that permits of no procrastination and waits on the pleasure of none. When the old court house clock shall strike twelve again, at noon to-day, I shall cease to be a judge. I have not only had 'my day in court,' but I have had about twenty-five thousand of them. I was eligible for retirement five years ago, but the condition of business in the court of appeals at that time made my continued service essential.

"I chose to-day for my retirement, as a matter of sentiment, because to-day is the twenty-second aniversary of my appointment to this bench. This swarm of memories, recollections, old scenes, old friends that are brought up this morning by the more than generous words spoken here have 'roused others that are hard to repress. The court room has been my habitation for twenty-seven years. Many men have passed before me in those years. I have seen somewhat of life in that time; ambitions only partly attained, tomes of writing unfinished yet, mountains of work. It would be remarkable, indeed, if in all those years, traversing such continents of law, I should not have blundered somewhere. . . .

"As I stand here, far down the slope toward the sunset glow, I recall the words of that great Democrat and statesman, Grover Cleveland, 'I have tried so hard to do right.' All I can say of my judicial career is this, As God is my witness, I have tried so hard to do right. I have done my duty as God gave me the light to see it. And when I shall step from this stand it will be with malice toward none and charity for all, with no bitter regrets, but hopes and aspirations that my feet soon will tread the primrose pathway that leads into meadows of peace where no bitter waters run.

" 'Old wood to burn,
Old wine to drink,
Old friends to greet,
Old books to read.'

# Moral Obligation as a Consideration for an Express Promise

BY GEORGE H. PARMELE

THERE was formerly an impression, derived originally, perhaps, from some generalizations by Lord Mansfield, that a mere moral obligation is a sufficient consideration to support an express promise. This view, however, at least so far as it embraced moral obligations in the sense of a mere conscientious duty resting solely on ethical considerations, was challenged and practically overthrown by a note to the case of Wennall v. Adney, 3 Bos. & P. 249, and the subsequent cases adopting the reasoning and conclusions of the writer of that note. The law, therefore, permits one to repent of his passing fancy to transmute his moral obligations of this character into legal liabilities, however strong the appeal to the conscience, or however commendable his original purpose. A good, or at least an illuminating, illustration of the application of this undoubted rule, is afforded by the case of Mills v. Wyman, 3 Pick. 207, where the court, while recognizing the strong obligation resting upon a father to reimburse a stranger for expenses incurred, without the former's request, in caring for an adult son who had fallen into poverty and distress, nevertheless held it was insufficient to constitute a consideration to sustain an express promise by him to do so, he being under no legal duty to care for his adult son. Upon the other hand, it is equally well settled that the moral obligation resting upon one whose antecedent legal liability has been discharged or suspended by some positive rule of law enacted for the protection of persons in his situation, and not for the protection of the public generally, will constitute a sufficient consideration to sustain a subsequent express promise to reassume that liability. The cases upholding the validity of new promises after the bar of the statute of limitations, or after a discharge in bankruptcy, are familiar illustrations of this point.

The question of difficulty and conflict arises with respect to subsequent express promises based on moral obligations arising from the previous receipt by the promisor of actual or material benefit conferred by the promisee either in reliance upon a contract void *ab initio*, or without any previous contract or request at all, void or otherwise. New promises after discoverture, following void contracts made by married women during coverture, are familiar examples of the first alternative; and as shown in a note in 7 L.R.A.(N.S.) 1053, there is a square conflict of authority as to the validity of such new promises.

Instances of the second alternative are not so numerous. Such an instance, however, is furnished by the decision of Judge Gaynor in Drake v. Bell, 26 Misc. 237, 55 N. Y. Supp. 945, that the moral obligation resting upon the owner of a house who had been benefited by repairs made thereon by a mechanic, under a mistake, he having been employed by a third person to make the repairs on the house next door, affords a sufficient consideration for a subsequent express promise by the owner to pay therefor. Another instance of this kind is Boothe v. Fitzpatrick, 36 Vt. 681, holding that a promise to pay for the past keeping of a bull which had escaped from the defendant's premises and had been cared for by the plaintiff was good although there was no previous request. A very recent instance is Edson v. Poppe (S. D.) 26 L.R.A.(N.S.) —, 124 N. W. 441, in which the South Dakota court held that the promise of a property owner to pay the cost of driving and casing a well which his tenant had constructed on the property was supported by a sufficient consideration if the services were beneficial to him, and were not intended

to be gratuitous. It will be observed that in none of the three cases just referred to was there any previous request, express or implied, and there was, of course, no antecedent contract, void or voidable, nor legal liability, perfect or imperfect.

While the results reached in these cases seem eminently just and fair, and contrary results would have been shocking to the moral sense, yet it must be conceded that there are many cases which lay down an antagonistic rule. The difference in principles is represented, on the one side, by cases that declare in effect that a moral obligation does not form a valid consideration for a subsequent promise unless the moral duty was once a legal one, and, upon the other side, by Judge Gaynor's statement in the case already referred to, that "a subsequent promise founded on a former enforceable obligation, or on value previously had from the promisee, is binding." In the first form the principle amounts to little, if anything, more than a declaration that the moral obligation is sufficient to sustain an agreement to waive the defense that the former legal liability has been discharged or is no longer enforceable. The controlling principle is perhaps more often stated in the first form than in the second. In many of the cases, however, that state the rule in that form, the moral obligation involved was either of the first class above referred to, which is conceded to be insufficient to sustain a subsequent promise, or of the second class, which is conceded to be sufficient for that purpose, so that the courts were not called upon to pass upon the sufficiency of a moral obligation of the third class as to which the conflict exists. There are, however, some cases that have applied the principle in the first form by holding that a moral obligation of the third class is insufficient to sustain a subsequent express promise. Thus, for instance, in Massachusetts Mut. L. Ins. Co. v. Green, 185 Mass. 306, 70 N. E. 202, it was held that a subsequent promise to repay one who has paid an indebtedness of the promisor is not equivalent to an original request, and is without consideration. And to the same effect is Thomson v. Thomson, 76 App. Div. 178, 78 N. Y Supp. 389 (disapproving Doty v. Wilson, 14 Johns. 378).

The impression apparently entertained by many courts, that, to render a moral obligation a sufficient consideration for an express promise there must have been at some previous time a legal liability on the part of the promisor to the promisee, seems to have had its origin in a statement by the writer of the note in 3 Bos. & P. that Lord Mansfield gave as instances of express promises supported by a moral obligation: a promise to pay a debt barred by the statute of limitations; a promise by a bankrupt, after his certificate, to pay an antecedent debt; and a promise by a person of full age to pay a debt contracted during his infancy,—all cases, it will be observed, in which there was at one time a legal liability, perfect or imperfect, though not enforceable at the time of the subsequent promise. Undoubtedly, cases of the kind Lord Mansfield thus instanced afford the most numerous and familiar examples of moral obligations arising from the receipt of actual material or pecuniary benefit, apart from any legal liability existing at the time of the express promise; but Lord Mansfield evidently did not mean to intimate that they were the only cases of that kind, or that it was only where there was once a legal liability that a moral obligation would constitute a consideration, since he laid down the rule in terms broad enough to cover even moral obligations of a mere conscientious nature, unconnected with the receipt of actual material or pecuniary benefit by the promisor.

Certainly, a principle that is so technical as to make the validity of a new promise by one who has received the benefit under a previous unenforceable contract depend upon the question whether the statute theoretically admits the existence of the former contract, and merely prevents its enforcement, or declares it absolutely void, does not appeal very strongly on the practical side. Nor when facts like those involved in Drake v. Bell, for instance, and other cases of that kind already cited, are presented, is one inclined to admit the soundness of the principle, unless constrained thereto by necessity. The necessity, if the general doctrine that a mere moral obligation of

a conscientious nature, resting solely upon ethical considerations, will not sustain a subsequent express promise, is to be maintained, of admitting that a moral obligation, in order to constitute a consideration for an express promise, must once have been a legal liability, might be conceded, if the existence or nonexistence at some prior time of a legal liability were the only criterion by which a moral obligation of a conscientious nature merely may be distinguished from a moral obligation arising out of, or connected with, circumstances of which the courts may take cognizance. There is, however, an essential and vital distinction between a moral obligation which springs merely from ethical considerations and one which springs from or is connected with the receipt of benefit of a material or pecuniary kind which of itself, and apart from any element of detriment to the promisee, would have sustained an antecedent or contemporaneous express promise. Indeed, the distinction based on the fact whether or not the promisor received any material benefit, as contrasted with the mere satisfaction of his ethical obligations, rather than that resting on the fact whether or not there was ever a legal liability, seems to be the real justification for upholding a subsequent express promise in one case and not in another. Since it must be conceded that even when there was formerly a legal liability which had become barred or discharged by operation of law, it was, prior to the subsequent promise, as much beyond the power of the law to enforce that liability without the promisor's consent or acquiescence, as if it had never existed, it is difficult to perceive how the fact of its former existence can have any legitimate effect upon the question as to the sufficiency of the moral obligation remaining after the bar or discharge to support a new promise, except as it may enable the court to distinguish that moral obligation from those moral obligations which rest solely on ethical considerations of which the court may not take cognizance. But, as already intimated, the question whether the benefit received by the promisor was of such a material or pecuniary character that it would in itself, and apart from any element of detriment to the promisee, have sustained an antecedent or contemporaneous express promise, affords a practical and accurate test by which the two kinds of moral obligations may be distinguished. The application of this test, for example, to the assumed facts upon which Judge Gaynor decided Drake v. Bell, at once discloses a moral obligation of a kind that even apart from any detriment to the promisee, would have sustained an antecedent or contemporaneous promise, and is, therefore, sufficient to sustain a subsequent express promise, whereas its application to the facts involved in Mills v. Wyman discloses at once a moral obligation resting solely upon ethical considerations, and destitute of any element of material or pecuniary benefit which, apart from the detriment to the promisee, would have sustained an antecedent or contemporaneous promise, and which is, therefore, insufficient to support a subsequent express promise. The more liberal doctrine, embodied in the statement of the principle above quoted from Judge Gaynor's opinion, does not, therefore, trench at all upon the rule that moral obligations of a merely conscientious nature, unconnected with the receipt of actual material or pecuniary benefit by the promisor, will not afford a consideration for a subsequent express promise. Nor, even under this more liberal doctrine, does the fact that the moral obligation of a conscientious nature, resting upon the promisor, but unconnected with the receipt of actual material or pecuniary benefit, was accompanied by material and pecuniary detriment to the promisee, render it a sufficient consideration to support a subsequent express promise.

To render this doctrine applicable it must appear: (1) That the service or other consideration moving from the promisee conferred an actual material or pecuniary benefit on the promisor, and not merely that it resulted in detriment to the promisee; (2) that the promisee expected to be compensated therefor, and did not intend to confer a mere gift or gratuity; (3) that the circumstances were such as to create a moral obligation on the part of the promisor; (4) that the benefit received must not have constituted the consideration for another promise, already enforced or still legally enforce-

able. It is not necessary, however, under this doctrine, that there shall have been at any time any legal liability resting upon the promisor, although, of course, the fact that there was at one time such a legal liability does not take the case out of the doctrine.

The best argument, perhaps, against the doctrine which insists that the moral obligation must have been a legal liability in order to constitute a consideration for a subsequent express promise is the result accomplished by its application in cases like the Green and Thomson Cases, above referred to, or the result it would have accomplished if applied to the facts of the Drake Case. Judge Gaynor, in the latter case, after stating that the question was not free from doubt, pertinently quoted the words of Chief Justice Marshall: "I do not think that law ought to be separated from justice where it is, at most, doubtful."

The doctrine here urged, it will be observed, does not call upon the courts, in the search for a consideration, to go outside the domain of material and pecuniary benefit, and enter the realm of mere moral duty, since the benefit necessary to make this doctrine applicable is of the same material and pecuniary nature as that which the court is accustomed to recognize as sufficient to constitute a consideration for an antecedent or contemporaneous promise, irrespective of any element of detriment to the promisee. This doctrine, moreover, affords full opportunity for the withdrawal of a promise prompted by a too sensitive appreciation of benefits of a mere sentimental nature, and full protection against the interference of an officious or innocent meddler who undertakes to improve another's property or pay another's debts at his expense, but without his knowledge or consent, so long as the latter refrains from promising reimbursement; but if, recognizing his moral obligation and the material pecuniary and financial benefit that has been conferred upon him, he sees fit to bind himself, in the language of a Louisiana case, "let him be bound."

# Higher Ideals for Lawyers

IN a recent address, President Taft struck directly at the cause of much of the complaint that the law does not always mete out justice at its bar. He emphasized what the best lawyers have long recognized, that the law's failure is due more often to the misdirected zeal with which lawyers often serve their clients, bending energy to the winning of their case, without regard to the justice of the cause which they have been employed to serve, and unmindful of the fact that they owe a duty to the public, as well as to their client. The President says:

"One must recognize that the administration of justice in this country has suffered grievously from the intensity with which lawyers have served their clients, and the lightness of the obligation which they have felt to the court and to the public, as officers of the court and the law, to do no injustice. The lack of scruples as to means, which counsel too frequently exhibit in defense or preservation of their clients, is often the occasion for popular resentment. The conduct of the defense of criminals in this country, and the extremes to which counsel deem themselves justified in going to save their clients from the just judgment of the laws, have much to do with the disgraceful condition in which we find our administration of law."

This is indeed a severe arraignment of the men whose profession it is to uphold the administration of law and facilitate the workings of justice. But, after all, the President has but voiced what most people know to be a fact, and the worst of it is, as he says, he sees no remedy except in the expulsion from the profession of those men who stoop to such practices. But such a remedy would be most difficult of application. The border line between commendable zeal and pernicious activity is hard to define.

# The "Summing Up"

BY FRANCIS L. WELLMAN

**Being a part of Chapter XIII. from his remarkable book, entitled "Day in Court," or "The Subtle Arts of Great Advocates," copyright 1910, by the MacMillan Company, New York, and reprinted in CASE AND COMMENT by special permission of the author.**

IN the ordinary case such as is likely to occur during the first ten years of an advocate's practice, if he has done his work properly up to the time for his closing argument, it ought not to be necessary for him to spend much, if any, time in his "summing up."

In other words, if his case has been thoroughly prepared, his jury carefully chosen, his facts clearly set forth in his "opening," his own witnesses skilfully examined, so that their testimony is plainly understood by the jury, and his adversary's witnesses have been subjected to the tests of cross-examination, there should be little need of a summing up in the ordinary simple case.

Of course, the more complicated the facts, the more important the summing up becomes.

### Relation of Minor Facts to Main Issues

In the closing argument one should always bear in mind that the jury has heard the evidence in court for the first time, and in a comparative hurry, whereas counsel may have studied the facts for weeks or months before the trial. The jury, therefore, cannot so fully measure the value of the testimony, nor so well understand its force and effect. In many cases they need these things pointed out to them, and need to be shown the connection between the multifarious little bits of testimony that go to establish the main issues which they are to decide.

It requires but little experience in court to arrive at the conclusion that the great majority of cases are composed of a few principal facts, surrounded by a host of minor ones; and that the strength of either side of a case depends not so much upon the direct testimony relating to these principal facts alone, but, as one writer very tersely puts it, "upon the support given them by the probabilities created by establishing and developing the relation of the minor facts in the case."

It is the business of the advocate in his summing up to gather these multifarious minor facts, and to so arrange them that their character and effect and relation to one another and to the principal facts in the case may be appreciated by the jury without any great mental effort upon their part.

In almost every trial there are circumstances which, to a jury, may appear light, valueless, even disconnected, but which, if skilfully handled by the advocate in his summing up, become united together and thus form wedges which drive conviction into the jurors' minds.

### Marshaling Facts and Circumstances

An important principle to be borne in mind is that a closing argument filled with mere naked assertions is always feeble. It is not enough merely to state the evidence of the witnesses, however clear and concise the recital may be. But, as already indicated, the connection between the facts must be shown, their relation to one another, their value must be exhibited, their probability or improbability pointed out, their truth established or their falsity exposed. The testimony should be carefully and skilfully analyzed, and the strength of the advocate's own evidence and of his own strong points made prominent, and clearly con-

trasted with the weakness of his adversaries' evidence and position. The conduct of witnesses, both in and out of court, including their relations to the case, their motives, their bias, and credibility should be discussed, and their contradictions pointed out or explained away; everything that militates against his side should be carefully scrutinized, and, where possible, should be criticized with the utmost severity. Improper motives and suspicious circumstances are proper subjects for comment and sometimes for invective, and, finally, all arguments and inferences against his side of the case should be met and clearly refuted.

This skilful marshaling of facts and circumstances, casting weak points into shadow and bringing out strong ones into bold relief, clearly explaining events and circumstances, giving tone and color to testimony, is one of the crowning arts of the advocate. But he should remember that, as someone has said, with the shading and coloring materials the advocate needs always to do as a great painter advised a poor one to do with his colors, mix them "with brains."

### Evidence more Powerful than Eloquence

Outside of the legal profession the prevailing idea of a great advocate seems to be that he must be a great orator,—that most rare and magnificent creation of the Almighty.

In the days of Erskine, Burke, Rufus Choate, and Webster this was more or less true, and in those days such characters were fairly idolized in the communities in which they tried their cases.

When Patrick Henry "summed up" the celebrated tobacco case against the parsons in 1758, it is said that the people might have been seen in every part of the courthouse, on the benches, in the aisles and in the windows, hushed in deathlike stillness, and bending eagerly forward to catch the magic tones of the speaker. The jury were so carried away by his eloquence as entirely to lose sight of the express legislative enactments which clearly gave the plaintiffs the right to a verdict, and even the court lost the equipoise of its judgment, and refused a new trial; while the people (who could scarcely keep their hands off their champion after he had closed his harangue) no sooner saw that he was victorious than they seized him at the bar, and in spite of his own efforts and the continued cry of "Order!" from sheriff and the court, bore him on their shoulders out of the courthouse, and carried him about the yard in frenzied triumph. (Donovan's "Modern Jury Trials.")

The accounts given of the effects by some of Daniel Webster's speeches seem almost incredible to those who have never listened to him.

Professor Ticknor, speaking in one of his letters of the intense excitement with which he listened to Webster's Plymouth address, says: "Three or four times I thought my temples would burst with the gush of blood; for after all you must know that I am aware it is no connected and compact whole, but a collection of wonderful fragments of burning eloquence, to which his manner gave tenfold force. When I came out, I was almost afraid to come near him. It seemed to me that he was like the mount that might not be touched, and that burned with fire."

And where was "the force of fighting eloquence better illustrated than when General Butler was heard in his powerful philippic on an Indianapolis editor, when hundreds stood up on their seats and shouted: 'Hit him again! Give it to him!' striking their hands together and reiterating, 'Give it to him! give it to him!'" (Donovan's "Modern Jury Trials.")

But nowadays the public press (and thereby the general diffusion of information), the better education of the middle classes, the gradual development and growing intelligence of mankind, have materially weakened the force of oratory,—formerly the one most effective weapon of the advocate.

It is now evidence rather than eloquence that prevails with our modern juries, and this is becoming more so every day, and the old-fashioned formal harangues, "flashings of intuition," have gradually given way to the brief, businesslike speeches of modern times.

It would hardly be germane to our subject to discuss the changes in society

and the manifold causes that have led up to this state of affairs; but certain it is that nowadays we seldom, if ever, witness the dramatic scenes that a century ago used to characterize jury trials. Whereas in the days of Henry and Webster, when speaking on questions the decision of which involved the most momentous consequences to his country, the orator could not have been expected to speak temperately, for his words came red-hot from his heart.

In these days, however, the great majority of questions that come up for decision turn on masses of contradictory testimony on matters relating to everyday business or social life, and the vehemence of a Burke or a Demosthenes would be very much out of place. In its stead we now have displayed by our leading advocates a happy facility of dealing with tangled or complicated facts, combined with keen ingenuity and skill, sound judgment, and a power of clear, logical, luminous statement.

The up-to-date advocate who can thus present his case on the facts with precision and clearness is bound to win in the long run.

I shall never forget a story told me by the late Recorder Smyth which I think has enabled me to win many a difficult case. William A. Beach had made one of his impassioned speeches in behalf of a prisoner whom he was defending in the recorder's court. He retired to the corridor of the courthouse for some fresh air, and was peering in through the court room door, when an enthusiastic admirer came up to him and congratulated him on his eloquent address to the jury, which could not fail to acquit the prisoner. "My friend," said Beach, "you fail to observe that the district attorney, who is now replying to me, is reading the *stenographer's minutes of the testimony to the jury;* after that there *can* be no acquittal."

Hence the "sound and fury" of the ancient orator is now seldom heard in our country, and except on rare occasions, the modern advocate "deals in facts rather than in fancies, in figures of arithmetic rather than in figures of speech."

### Avoid too Flowery Language

In this connection attention is called to the danger of using too flowery language in "summing up." I cannot better emphasize this point than in the language of Dr. Hall, who once wrote:

"If I were upon trial for my life, and my advocate should amuse the jury with tropes and figures, burying his argument beneath a profusion of metaphors, I would say to him: 'Tut, man; you care more for your vanity than for my hanging. Put yourself in my place; speak in view of the gallows, and you will tell your story plainly and earnestly.' I have no objection to a lady's binding a sword with ribbons and studding it with roses when she presents it to her lover, but in the day of battle he will tear away the ornaments and present the naked edge to the enemy."

Another good illustration of the danger of using too florid speech is afforded by the story of an English barrister who, having made the mistake of using too flowery language in addressing a hard-headed English judge (when such speech was in bad taste and wide of the issues before the court), was impatiently rebuked by his Lordship, who remarked, "I advise you, sir, to pluck a few feathers from the wings of your imagination and stick them in the tail of your judgment."

### Cultivate the Art of Speaking Well

Of course, it is the ambition of all advocates to speak well. They recognize with Cicero that it is "most glorious to excel men in that in which men excel all other animals." Eloquence, it is true, like a genius for music or invention or painting, is primarily a gift born with a person, but, like all other divine inheritances, it is a gift which needs to be assiduously cultivated and developed. It is, therefore, a matter of regret that so little attention is paid in our colleges and law schools to this branch of education. For, surprising as it may seem, the one thing most neglected in our law schools is the art of speaking in a tone and manner attractive to, and easily understood by, a court or jury.

Lord Chesterfield went so far in his letters to his son as to tell him that every

man of fair abilities might be an orator. The vulgar, he said, look upon a fine speaker as a supernatural being and endowed with some peculiar gift of heaven. He himself maintained that a good speaker is as much a mechanic as a good shoemaker, and that the two trades were equally to be learned by the same amount of application. But by the term "orator," Chesterfield evidently meant a pleasing and persuasive speaker.

Henry Ward Beecher, in writing on the study of oratory, says:

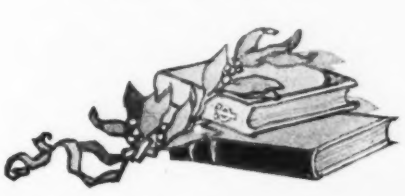
"Now, in regard to the training of the orator, it should be a part and parcel of the school. The first work is to teach a man's body to serve his soul. Grace, posture, force of manner, the training of the eye that it may look at men, and pierce them, and smile upon them, and bring summer to them, and call down storms and winter upon them; the development of the hand that it may wield the scepter or beckon with sweet persuasions;—these themes belong to men. And, among other things, the voice,—perhaps the most important of all and the least cultured. What multitudes of men there are who wear themselves out because they put their voice on a hard run at the top of its compass, and there is no relief to them, and none, unfortunately, to the audience. But the voice is like an orchestra. It ranges high up and can shriek betimes like the scream of an eagle; or it is low as the lion's tone; and at every intermediate point is some peculiar quality. It has in it the mother's whisper and the father's command. It has in it warning and alarm. It has in it sweetness. It is full of mirth and full of gayety. It glitters, though it is not seen, with all its sparkling fancies. It ranges high, intermediate, or low, in obedience to the will, unconscious to him who uses it; and men listen through the long hour, wondering that it is so short, and quite unaware that they have been bewitched out of their weariness by the charm of a voice, not artificial, but by assiduous training made to be his second nature. Such a voice answers the soul and is its beating."

In this connection it is interesting to note that Beecher himself placed himself, when at college, under a skilful teacher, and for three years was drilled incessantly, he says, in posturing, gesture, and voice culture, and continued the same studies afterwards at the theological seminary.

Largely because of the lack of such a training there is a large number of dull, uninteresting speakers that we hear in our courts every day, wearying their juries with their pointless, endless speeches, delivered in monotonous, meaningless, sleep-producing tones, accompanied by the most inappropriate gestures, and burying their evidence under an avalanche of words and ambiguities. How little have they learned of "the divine art which harmonizes language till it becomes a music, and shapes thought into a talisman!"

Indeed, many lawyers try to be eloquent without knowledge, regarding speech as "something given to man to disguise his thoughts." They indulge in what are not inappropriately called "mouthfuls of wind," and appear, when speechmaking, to have followed Rousseau's receipt for a love-letter,—"to begin without knowing what you are going to say, and to leave off without knowing what you have said."

(To be continued)



# The Editor's Comments


## Case and Comment

THE LAWYER'S MAGAZINE

Established 1894.

¶ Edited, printed and published monthly, by The Lawyers Co-operative Publishing Company: President, W. B. Hale; Vice-President, J. B. Bryan; Secretary, B. A. Rich; Treasurer, W. H. Briggs.

¶ Office and plant: Aqueduct Building, Rochester, New York.

¶ TERMS:—Subscription price $1 a year, 10 cents a copy. Advertising rates on application. Forms close 15th of Month preceding date of issue.

¶ EDITORIAL POLICY:—It is the purpose of CASE AND COMMENT to voice the highest legal and ethical conceptions of the times; to act as a vehicle for the dissemination and interchange of the best thought of the members of the legal profession; to be both helpful and entertaining,—serving the attorney both in his work and in his hours of relaxation.

Edited by Asa W. Russell

Vol. 17 AUGUST, 1910 No. 3


### *Vacation Time*

THE courts are silent. Dust is settling on the venerable tomes of the law. Justice, which neither slumbers nor sleeps, is decidedly somnolent.

Bench and bar are responding to the "call of the wild," to the lure of rod and paddle, racket and golf-stick.

The waters call, the mountains invite, the forests beckon, and we instinctively yield to their allurement. Only in this way may we gain that "sound mind in a sound body" which has been the ideal of human excellence for ages.

The long, golden summer days are replete with vitality which we may drink in, and hereafter expend in the exhausting labors of an arduous profession.

Draw close to Nature,—the life-giving mother of us all. Be a big goodnatured boy during July and August, and you will be a better and more forceful man for the balance of the year.

### *Law and the Classics*

COURTS of law, says the Minneapolis Journal, have given small evidence of literary perception, as a rule. Witness that judgment of a Federal court enjoining Rostand as a plagiarist of the intellectual product of Samuel Eberly Gross, —a judgment that would justify all the strictures of Shakespeare on the dullness of judges, all the satire of Dean Swift on the folly of judicial determination. But in literary issues there is in St. Paul a Daniel come to judgment, who rules that as Balzac is now a classic by the verdict of eighty years, he will not hold against Balzac's works on the score of their immorality.

We venture to believe that this particular judge is a Balzacian, as was the late John Hay, according to Roosevelt. To be a Balzacian, one does not have to like or even to read all that Balzac wrote. Some of it is not in good taste, not to mention morals, but the same must be said of every great writer,—Shakespeare, Goethe, Voltaire.

For a court of law, or for anyone else, however, to venture to expurgate Balzac or Homer, or the Old Testament, for that matter, would be a work of egregious supererogation.

There is a law of prescription as regards real estate. Prescription runs in literature also. Every generation cannot undertake to expurgate, according to its particular code, every classic, before that classic is permitted to be read, printed, circulated.

All meat is not meat for children.

Some meat is not even for strong men. From life itself we learn to reject that which is unpleasant and harmful. The same practice must be pursued with literature.

The adjudication which the Minneapolis Journal so strongly commends is not without judicial precedent. In 1894 the New York supreme court, in Re Worthington Co., 24 L.R.A. 110, held that Payne's Arabian Nights, Fielding's Tom Jones, the works of Rabelias, Ovid's Arts of Love, the Decameron of Boccaccio, the Heptameron of Queen Margaret of Navarre, Rousseau's Confessions, Tales from the Arabic, and Aladdin, are not so immoral that a receiver will be prevented from disposing of them when found among the assets which come into his hands. In support of this decision the court said: "It is very difficult to see upon what theory these world-renowned classics can be regarded as specimens of that pornographic literature which it is the office of the Society for the Prevention of Vice to suppress; or how they can come under any stronger condemnation than that high-standard literature which consists of the works of Shakespeare, of Chaucer, of Laurence Sterne, and of other great English writers, without making reference to any parts of the Old Testament Scriptures, which are to be found in almost every household in the land. . . . It would be quite as unjustifiable to condemn the writings of Shakespeare and Chaucer and Laurence Sterne, the early English novelists, the playwrights of the Restoration, and the dramatic literature which has so much enriched the English language, as to place an interdict upon these volumes, which have received the admiration of literary men for so many years. What has become standard literature of the English language,—has been wrought into the very structure of our splendid English literature, is not to be pronounced at this late day unfit for publication or circulation, and stamped with judicial disapprobation as hurtful to the community."

Most of our judges are scholarly men who have supplemented a deep knowledge of the law with a broad acquaintance with the world's best literature. Nowhere could a body of men be found more competent to pass upon the merits of the products of the greatest literary genius or one whose verdict would be more consistent with good taste, law, morality, and expediency.

## *Cruel and Unusual Punishment*

CRIMINAL lawyers throughout the country are said to be agitated over the action of the Supreme Court of the United States in inaugurating what is designated as a new era in the punishment of criminals,—that of requiring punishments to be proportionate to the offense. The agitation among the legal profession arises from a recent decision which may be found among the New Decisions in this number, in which the law, for the first time in its history, set at liberty a person convicted of an offense, because there was inflicted upon him "a cruel and unusual punishment." It was in the case of Paul Weems, an official in the lighthouse service in the Philippines. His case came under the Bill of Rights of the island. The court announced that it must give the same interpretation to that Bill of Rights as is given to the 8th Amendment to the Constitution. Thereupon, it proceeded to construe this amendment, prohibiting "cruel and unusual punishments."

It was admitted that, in the musty precedents of the past, the English-speaking people used this phrase only to prohibit the resort to inhuman methods for causing bodily torture. It was used to prevent disemboweling traitors and burning alive women who committed treason. The court decided to regard these precedents as milestones in the advance of civilization, and not as limitations on the phrase. "In the application of a Constitution," said Justice McKenna, in announcing the decision of the court, "our contemplation cannot be only of what has been, but of what may be."

Much speculation exists as to the effect of the decision. That it will apply to the territories and the District of Columbia is not doubted. The court has determined that the 8th Amendment is not applicable to the states, and hence the states will not be compelled to follow the new prin-

ciples. A flood of applications for the release of prisoners sent to the penitentiary by the Federal courts, on the ground that their punishment was not proportionate to their offenses, may result from the decision.

## *The Lawyers and the Law*

JUDGE John D. Lawson, in the Journal of Criminal Law, is credited with this biting expression: "If all the professions were as far behind the times as the legal, we still would be using the sedan chair and horseback messengers, instead of railroads and telegraph lines. The legal profession is the only one in the last century that has learned nothing and forgotten nothing. We have not advanced one step since the days of Queen Elizabeth."

"But," comments the Columbia (S. C.) State, "Is not that quite natural? If 'Sergeant Buzfuz' had anything in stock, it was an innumerable assortment of maxims and precedents, bewildering and apparently contradictory as viewed by the lay mind, but well ordered, nicely adjusted, and ready for instant application by his own. Were all the statutes to be repealed by a single act, what would become of the lawyers,—the young gentlemen who have spent some thousands of dollars in preparing themselves to straighten tangled skeins? The aim of science is to generalize, to order and simplify, but is it not true that the legal profession multiplies complexities? Is not what a lawyer ecstatically pronounces a 'beautiful point' often an exquisite bit of foolery? The sewing machine and the bicycle of thirty years ago have been consigned to the junk heap; in an American city a twenty-two-story steel-framed building, which was a world's wonder when it was built, a little while ago, is being wrecked because the room is needed for a better; but a statute of King James's or King Charles's time, wormeaten, unwieldy, unfitted for the purposes of a new day, is seldom if ever abolished, but its poor carcass is plastered and poulticed with a thousand new legislative amendments so that it may be productive of fee earning disputation. The lawyers are keen-witted; at parry and thrust they are adept; but the crux of Judge Lawson's indictment is that the profession is deadening to the constructive faculties."

The assertion has often been made that the lawyers deliberately use their influence in the matter of legislation, to render the law as complicated and confusing as possible, on the theory that such a condition is more conducive to complicated and profitable litigation. "While such a charge deserves no notice," observes Mr. Justice Angellotti in a recent address, "it is probably true that the profession as a whole has been negligent in not giving more attention to this matter. In this commercial age the busy lawyer, like the busy member of any other profession or calling, is often so engrossed with his own personal and business affairs that he has little time or disposition for the service of the state or his profession."

While the legal profession is not the law-making power of our government, national or state, by reason of their more adequate knowledge as to what is necessary to make the law accord with what is right and essential to the doing of justice under the conditions existing in their own time, and by reason of the influence which they must have if they live up to the traditions of their profession, lawyers can and should be a great factor in the making of proper laws. They undoubtedly will be held responsible for the condition of the law, although they did not constitute the direct law-making power. As was well said by a recent writer on this subject: "It may be confidently assumed that there is no disagreement among us on the proposition that our profession, as well as any other, is the responsible battalion for those interests of the day and generation in which it specializes. We can conceive of no higher duty on the part of lawyers than that of making every legitimate effort to procure the enactment of such laws as are essential to the perfecting of our system and the making it adequate to the ideas and demands of our age.

# Among the New Decisions

A brief review of recent important or novel decisions made by the courts of the English speaking world.

*Protest by owner as preventing acquisition of right of way by prescription.*. To establish an easement of private way over land by prescription, says the court in the recent West Virginia case of Crosier v. Brown, 66 S. E. 326, the use must be continuous and uninterrupted for the necessary period, under a bona fide claim of right adverse to the owner of the land, and with his knowledge and silence. If the use is by his permission, or if he opposes and denies the right, title to the easement does not arise by such use. This doctrine is not without considerable support in the earlier decisions, as disclosed by the note which accompanies the Crosier Case in 25 L.R.A. (N.S.) 174, although there are probably an equal number of cases which have adopted the opposite view.

*Appeal from order appointing guardian for alleged incompetent.* It has been heretofore determined that "aggrieved persons," within the statute allowing an appeal by such persons in proceedings for the appointment of a guardian for an alleged incompetent, are only those who have legal rights in the estate of the incompetent. The authorities on this question are reviewed in a note in 25 L.R.A. (N.S.) 155, accompanying the recent Wisconsin case of Re Carpenter, 123 N. W. 144, in which it is held that a nonresident sister of an alleged incompetent person, whose petition for the appointment of a guardian is denied, is not a person aggrieved, within the meaning of a statute regulating the right to appeal, since none of her legal rights are infringed, she having no right to control the custody or conduct of the alleged incompetent, nor any right to support from, or duty to care for or support, him, and no legal rights in or to his property.

*Void or unfounded claim as subject of valid compromise.* Where two parties enter into an agreement concerning a sum of money due from one to the other, and a note is given for the amount agreed upon, it is held in the New Mexico case of Amijo v. Henry, 89 Pac. 305, that such note is not void for failure of consideration, in whole or in part, where there was no fraud or mistake, and where each of the parties had the same means of ascertaining the validity of the amount claimed by the payee in the note. The report of this case in 25 L.R.A.(N.S.) 275, is accompanied by a subject note, which presents an exhaustive view of the authorities upon the question, from which it may be concluded that a void, invalid, or unfounded claim may be the subject of a valid compromise whenever the circumstances and conditions upon which all valid compromises depend concur, and the invalidity of the claim compromised does not rest in a violation of law.

*Violation by citizen of decree against municipality as contempt.* A question not previously passed upon by the courts was presented by the recent case of State ex rel. Jackson v. Pittsburg, 80 Kan. 710, 104 Pac. 847, 25 L.R.A.(N.S.) 226, holding that all concerned in the carrying out of an arrangement whereby a number of saloon keepers raised a fund from which they for a time paid the salaries to some of the city's officers and employees, in order to evade the effect of a final judgment ousting the city from the exercise of the unwarranted power of (in effect) licensing the sale of intoxicating liquors under the guise of collecting fees by simulated prosecutions for violation of the prohibitory law, were guilty of contempt of court, whether or not they were regarded as having violat-

ed an injunction directed against them. There are many cases holding that the violation of such a decree by an officer, agent, or servant of a municipal corporation will constitute contempt of court.

*Bucket shop transactions as "game of hazard" or "gambling device."* Transactions in a bucket shop, consisting of fictitious contracts of sale or purchase for future delivery of stocks, with the intention that there should be no delivery, but a settlement by paying the difference in prices, are held not a "game of hazard," in the recent Nebraska case of Ives v. Boyce, 123 N. W. 318; nor is a telegraph wire, blackboard, and ticker used by the broker in obtaining and publishing the rise and fall of prices in the New York market a "gambling device," within the meaning of the Nebraska Code. This question seems to have been seldom passed on by the courts, and this may be due in a measure to the fact that in some jurisdictions bucket shops are expressly prohibited, while in others the dealing in futures or margins is expressly forbidden. The tendency of the few cases dealing with the subject, as appears in the note accompanying the Ives Case in 25 L.R.A.(N.S.) 157, seems to be to fortify the position taken by the court in that case. The closely allied question whether a bucket shop is a "place for gaming" is treated in a case note appended to Wade v. United States, 20 L.R.A.(N.S.) 347.

*Cruel and unusual punishments.* A majority of the justices of the Supreme Court of the United States hold in the recent case of Weems v. United States, U. S. Adv. Sheets, p. 544, that cruel and unusual punishment forbidden by the Philippine Bill of Rights is inflicted by the provisions of the Philippine Penal Code, under which the falsification by a public official of a public and official document must be punished by fine and imprisonment at hard and painful labor for a period ranging from twelve years and a day to twenty years, the prisoner being subject, as accessories to the main punishment, to carrying, during his imprisonment, a chain at the ankle, hanging from the wrist, to deprivation during the term of imprisonment of civil rights, and to perpetual absolute disqualification to enjoy political rights, hold offices, etc., and to surveillance of the authorities during life.

"No case," says the opinion, "has occurred in this court, which has called for an exhaustive definition of the clause forbidding cruel and unusual punishment. . . . What constitutes a cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous,—torture and the like. McDonald v. Com. 173 Mass. 322, 73 Am. St. Rep. 293, 53 N. E. 874. The court, however, in that case, conceded the possibility "that punishment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment."

The law writers are indefinite. Story, in his work on the Constitution, vol. 2 (5th ed.) § 1903, says that the provision "is an exact transcript of a clause in the Bill of Rights framed at the Revolution of 1688." He expressed the view that the provision "would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct." Cooley, in his Constitutional Limitations, hesitates to advance definite views, and expresses the "difficulty of determining precisely what is meant by cruel and unusual punishment." It was probable, however, he says, that "any punishment declared by statute for an offense which was punishable in the same way at common law could not be regarded as cruel or unusual, in a constitutional sense."

In the prevailing opinion, written by Mr. Justice McKenna, it is laid down: "With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to

cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say 'coercive cruelty,' because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyrrany; of zeal for a purpose, either honest or sinister."

The dissenting opinion, written by Mr. Justice White, and concurred in by Mr. Justice Holmes, concludes: "In my opinion, the review which has been made demonstrates that the word 'cruel,' as used in the amendment, forbids only the law-making power, in prescribing punishment for crime, and the courts in imposing punishment, from inflicting unnecessary bodily suffering through a resort to inhuman methods for causing bodily torture, like or which are of the nature of the cruel methods of bodily torture which had been made use of prior to the Bill of Rights of 1689, and against the recurrence of which the word 'cruel' was used in that instrument."

*Right to display red flag in a procession.* That there is no right to display a red flag in a procession, where those composing the procession know that the natural and inevitable consequences will be to disturb the public peace and tranquillity in violation of a statute or ordinance, is held in People v. Burman, 154 Mich. 150, 117 N. W. 589, 25 L.R.A.(N.S.) 251. The court observed: "The question here is not whether the defendants have, in general, a right to parade with a red flag: It is this: Had they such right when they knew that the natural and inevitable consequence was to create riot and disorder? Defendants knew this red flag was hated by those to whom it was displayed, because it was believed to represent sentiments detestable to every lover of our form of government. They knew that it would excite fears and apprehension, and that by displaying it they would provoke violence and disorder. Their right to display a red flag was subordinate to the right of the public. They had no right to display it when the natural and inevitable consequence was to destroy the public peace and tranquillity." The case is accompanied by a note on the validity of ordinances as to street parades, which is supplemental to an earlier note upon the subject in 19 L.R.A. 858.

*Measure of compensation to physician.* A novel question as to the measure of compensation to a physician employed to examine and report on the physical condition of one who contemplated bringing an action for personal injuries is passed upon in the case of Henderson v. Hall, 87 Ark. 1, 112 S. W. 171, 25 L.R.A.(N.S.) 70, in which it is held that in an action by a physician for services rendered a lawyer in examining his client, who claimed a right of action for personal injuries, which claim was settled before the action for services was brought, plaintiff is not entitled to more than ordinary fees, on the theory that his services were extraordinary and that he might have been compelled to attend court as a witness.

*Admissibility on trial of admission made to defeat continuance.* This interesting question is presented in the recent North Carolina case of State v. Butler, 65 S. E. 993, holding that an admission by attorneys for an accused at the preliminary hearing, to prevent a continuance to enable the state to secure certain evidence, and to secure a hearing without delay, is not admissible against accused at the trial, where the state has secured the evidence which it sought. The few decisions upon this subject are collated in a note which accompanies the Butler Case in 25 L.R.A. (N.S.) 169, and are all in accord with the conclusion reached in that case, that an admission made at the time a continuance of either a criminal or civil case is sought is not, if the continuance is granted, admissible in evidence at a subsequent trial, when the emergency for which the admission was made has ceased to exist.

*Notice to traveling salesman as notice to his employer.* An interesting question which has been but seldom before the courts was passed upon in the case of Jenkins Bros. Shoe Co. v. Renfrow, 151 N. C. 323, 66 S. E. 212, 25 L.R.A.(N.S.) 231, holding that notice of dissolution of a firm of customers, given to a traveling salesman, will bind his principal, where he is his sole representative in the section where the firm does business, reports references given by new customers, and dissolution of partnerships, and sometimes receives payments on account.

*Corroboration of testimony of party to divorce as to mental suffering.* The ancient rule which arose in the ecclesiastical courts of England, to the effect that no divorce would be granted on the uncorroborated testimony of a party, and which exists in this country either as a rule of common law or by statute, does not apply to testimony in relation to mental suffering of a party, as appears by a note in 25 L.R.A.(N.S.) 45, which sets forth the few authorities which have dealt with the question, and which accompanies the case of MacDonald v. MacDonald, 155 Cal. 665, 102 Pac. 927, holding that corroboration of the testimony of plaintiff in a divorce proceeding as to the infliction upon him of grievous mental suffering by defendant's acts, is not required by a statute providing that no divorce can be granted upon the uncorroborated testimony of the parties.

*Money decree for permanent alimony as lien on real property.* The question whether a decree for alimony operates as a lien on real property involves several considerations. On the one hand it is evident that, although a court may have the power to create a lien, it does not necessarily follow that the decree would constitute a lien if not declared to be such. On the other hand, if the decree operates *per se* as a lien, it is immaterial whether the court may declare a lien. It is conceivable, however, that a decree in gross may be held to be *per se* a lien, and a contrary holding be properly made as to a decree for continuing alimony. In the recent case of Scott v. Scott, 80 Kan. 489, 103 Pac. 1005, 25 L.R.A.(N.S.) 132, it is held that an allowance of permanent alimony, payable in instalments, does not create a lien on any property of the husband, unless the record affirmatively discloses that the court intended it to have that effect, notwithstanding the statute makes judgments liens on the real estate of the debtor. The court bases its decision upon the principle that where alimony is ordered to be paid in instalments, and nothing is said as to the manner of its collection, the fair inference is that the court intends the order to be enforced not by lien and execution,—a remedy manifestly ill adapted to the purpose,—but by attachment for contempt, if payment is not made,—a remedy always available.

*Substitution of new juror in criminal case for disabled or incompetent one.* If a juror in a criminal case becomes disabled or incompetent after the full jury has been impaneled and sworn to try the case, the proper procedure at common law, according to the established precedents, appears to be to discharge the entire panel and form a new jury. The discharge of the other eleven, however, may be waived by the accused, and is declared unnecessary by statute in some jurisdictions. But where the juror was incompetent at the time he was accepted, a competent jury never having been organized, he may be set aside without discharging the entire jury, and his place filled by a juror who is competent. This interesting question is discussed in the recent Mississippi case of Dennis v. State, 50 So. 499, in which it was held that when a juror becomes insane pending the trial of a criminal case, the court must declare a mistrial, and proceed *de novo*, and it is fatal error to substitute another juror, and proceed with the trial, if proper objections are taken to such proceeding. This decision is in conformity with the well-established rule which prevails in the absence of special statutory enactments, as appears by the authorities upon the question, which are viewed in a note in 25 L.R.A.(N.S.) 36.

*Liability of estate to attorney employed by executor or administrator.* Services performed by an attorney for the benefit of an estate, at the instance and request of the personal representative, are, by the weight of authority, individual obligations of the personal representative, and not primarily a claim against the estate, subject to certain exceptions based upon the insolvency, death, removal, or resignation of the personal representative, or upon the effect of an agreement giving the attorney a lien upon the subject-matter in litigation. This general rule is upheld in the case of Brown v. Quinton, 80 Kan. 44, 102 Pac. 242, in which it is laid down that attorneys employed by an administrator to assist him in administering his trust, or to prosecute or defend an action for or against him in his official capacity, have no claim they can enforce directly against the estate, but that the administrator is individually liable for such services, and upon settlement of his accounts he may be reimbursed out of the estate for attorneys' fees necessarily paid out as expenses of the administrator. There are, however, as appears by the note which accompanies the report of this case in 25 L.R.A.(N.S.) 71, many respectable authorities which sustain the right of an executor or administrator to bind the estate for reasonable attorneys' fees necessarily and properly rendered in preserving the estate, or where otherwise beneficial to it.

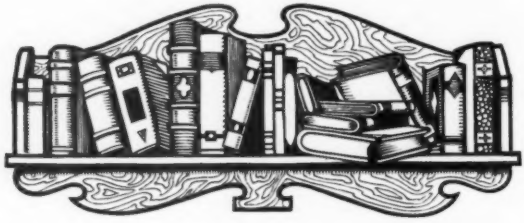
*Injunction against foreign suit.* The rule at first was that an injunction would not lie to estop a suit in a foreign court, but the later doctrine is that, although the chancery court cannot act directly to estop a suit prosecuted in another country, it may grant an injunction operating directly upon the person who attempts to prosecute such suit, if that person is properly within the jurisdiction of the court. The more recent cases all recognize the right of the court to grant an injunction restraining persons within its jurisdiction from prosecuting actions in foreign courts, and the question is rather when and under what circumstances equity will grant an injunction for this purpose. The power is used sparingly, and the petitioner must show good equitable grounds, or the injunction will not issue. This question was presented in the case of O'Haire v. Burns, 45 Colo. 432, 101 Pac. 755, holding that a citizen of a state will be enjoined by its courts from instituting a suit in another state against another citizen, both parties at all times residing within the state, upon a cause of action which has been adjudicated by such courts, and arose within its jurisdiction, the necessary witnesses being all there, and the foreign suit being instituted for the purpose of harrassing and annoying the other party, and the plaintiff being insolvent. This case is accompanied in 25 L.R.A.(N.S.) 267, with a note in which the recent cases are considered, and which is supplementary to a note in 21 L.R.A. 71, in which the earlier cases are discussed.

*Restraining erection of contagious disease hospital.* The right of a property owner to complain of the location of a contagious disease hospital in the neighborhood came up for further consideration in the recent Kansas case of Manhattan v. Hessin, 105 Pac. 44, 25 L.R.A.(N.S.) 228, dissolving a temporary order of injunction issued at the suit of a citizen to restrain the municipality from using as a pesthouse a building situated in a public park, and standing 500 feet from his residence, where the disease appeared among students, large numbers of whom were located in rooming houses throughout the city, and increased to such an extent that the health officers were unable to control or diminish the contagion by the ordinary methods of quarantine, and no other building than the one sought to be made use of and suitable for such a purpose could be obtained in the city. The earlier decisions upon the subject are reviewed in a case note in 5 L.R.A. (N.S.) 1028. There seems to be an irreconcilable difference of opinion among the authorities as to the right of a property holder to object to the location and

maintenance of a pesthouse or a hospital for the treatment of dangerously contagious diseases so near his property as to work him unmistakable injury.

*Failure of insurer to act after notice of breach of policy as waiver.* The secret of most of the apparent lack of harmony in the cases on this subject is that the terms of insurance policies differ so that a ruling upon one contract may not be applicable to another. If the rights of the parties have become fixed by loss before the insurer acquires knowledge of the breach, no court has held that mere silence or nonaction on its part will help the insured. If the policy is deemed to be void upon breach,—if the forfeiture is considered self-executing,—no court has held that the insurer must bestir himself to declare the forfeiture. The conflict is on the question whether policies declared in terms to be void upon breach are really void or voidable, that is, void at the election of the insurer, or not. In the recent case of Phenix Ins. Co. v. Grove, 215 Ill. 299, 74 N. E. 141, it is held that notice to an insurer, or its agent for receiving such notice, of additional insurance, and its failure to object, or to cancel the policy because thereof, is a waiver of the provision in the policy rendering it void in case of such additional insurance unassented to in writing by the insurer. The cases dealing with the question are exhaustively treated in a subject note appended to the case in 25 L.R.A.(N.S.) 1.

*Leaving live wire in unoccupied premises as negligence.* The case of Wheeler v. St. Marylebone Borough Council, tried in June before Mr. Justice Grantham and a special jury, is, we believe, says the Law Journal, the first case which directly raises the question of the negligence of an electric lighting authority in leaving a "live" wire in unoccupied premises. The house in question had been vacated, and was to be pulled down and rebuilt. The housebreakers gave the usual notice to disconnect the current, the meter having been removed by the defendants when the late tenant left. Everyone seems to have been under the impression that this had been done, but it transpired that the servants of the council had left the service cable in the cellar, because they had heard that the cellars were not coming down, and the same cable could be used in the event of a future tenant requiring the electric current. They sealed up the ends, but did not disconnect the current. The plaintiff, who was about to re-tile the cellar, found the cable coming through the wall, and, thinking it was an ordinary piece of pipe, proceeded to cut it off. He thereby created a short circuit, and was nearly burnt to death. The defendants alleged that the accident was due to the plaintiff's own negligence,—that he should have known the protruding tube was an electric cable; and, furthermore, they alleged that they had adopted the only possible means of rendering it safe. We cannot help thinking that the jury took the correct view when they negatived both these defenses, and returned a verdict for the plaintiff.



# New or Proposed Legislation

A glance at the labors of our lawmakers.

**Odd Laws in Aid of Health or Morals.**—Texas and Kansas have been prolific in freak legislation, and, says the Record-Herald, almost anything in the way of prohibitory laws may be expected from those states. In Kansas there is a statute requiring individual glasses or cups to be used at every well, every ice-water cooler, in railway cars, and wherever the public is permitted to drink water from a common fountain. The person in charge is liable to a heavy fine in case he permits two people to drink from the same cup or glass, and, as a consequence, on the railway trains the drinking utensils are taken away as the borders of Kansas are reached, and the passengers have to supply their own cups. This law is supposed to be necessary as a sanitary precaution, to prevent the spread of infectious diseases.

In New Mexico a bill was introduced in the legislature last winter providing that all persons desiring to drink at a bar should take out licenses by paying a fee of $2, the proceeds of which are to be devoted to education; and any saloon keeper or bartender supplying a drink of beer, wine, whisky, or other liquors to a customer who cannot show a license is to be punished by a fine of $25 for each offense. It is estimated that the license fees under such a law will practically support the public schools of the territory.

A bill has been introduced in the Texas legislature imposing a fine of $5 upon every person who uses profane language over a telephone.

The legislature of Porto Rico has passed a bill requiring everybody to wear clothing, under penalty of $2 or one day's imprisonment for every offense. It is customary for the natives in Porto Rico, as well as in all the other tropical countries, to strip down to the buff, or rather to the tan, in that particular case, while engaged in manual labor. Workmen seldom wear more than a pair of cotton drawers or trousers, a pair of sandals and a straw hat. Their naked busts and shoulders are considered an offense to the public eye, however; so in Porto Rico it is proposed to make everybody wear a shirt.

The Bulgarian sobranje, or parliament, has passed a law taxing bachelors over twenty-one years of age $2 a year, the proceeds to be devoted to education. Such a law has been in force in Salvador for many years.

A statesman named Hill introduced a resolution in the Texas legislature requiring lobbyists to carry whistles, and to blow three shrill blasts before approaching a member of the legislature, in order to attract the attention of bystanders. The idea is to prevent unobserved communication between promoters of legislation and statesmen who are subject to temptation.

**No Longer "Free as Air."**—American air is not to be free, says the Cleveland Plain Dealer. It is to be put under legal restraint. The Senate has passed a bill to regulate wireless telegraphy, and to compel all wireless telegraphers to procure licenses and act under Federal control. If the House concurs in this measure, it will soon be an offense for anyone to monkey with the atmosphere.

At present there are many amateur wireless telegraphers in the United States. Some of them are mere boys, whose mechanical turn of mind has taken this form of expression. These young enthusiasts are not only able to read all weighty government messages, but they also, it is said, seriously interfere with transmission. The wireless, at any rate,

has become so important that the Senate believes it is time to stop having it used as a plaything.

Probably some such regulation as that proposed by the Senate bill is wise and desirable. One of the chief drawbacks of the Marconi system has been its complete lack of privacy. Almost anyone can set up his receiving apparatus, and read all the flying messages. Cipher codes may be used, but even then it would be difficult to assure secrecy, for many ciphers may be solved by men who turn their attention to such problems.

It is difficult to see how the proposed law will remedy the existing difficulties. It may help some, and may put some schoolboys out of business, but the task of regulating and controlling the air looks too big even for the great American government. Wireless wire tapping is so easy and simple that a large army of detectives would be required to keep the air clear of eavesdroppers.

**Tenement Legislation.**—"In Indiana lives a woman who does not write plays or poetry or novels, but who as an author is fast coming abreast on fame's path with that state's best literary pioneers," says a writer in Hampton's magazine for June. "She has written only one work, but that has placed her in the front rank. She is the author of a housing bill that is revolutionizing tenement conditions in Indiana.

"Mrs. Albion Fellows Bacon is a little slip of a woman, the mother of four children,—with one daughter inches taller than herself,—who lives quietly at Evansville. Some years ago she came to the conclusion that in many cities the tenement conditions were just as impossible as in New York. This, and that four walls never make a home, she discovered by friendly visits in her native town. The slum conditions of the smaller cities were, she found, deplorable. And then, being a woman of sincerity and energy, she set to work.

"With her, charity began at home. Evansville was a fertile field. She interested her townspeople by personal appeal, and, with the Monday Night Club at her elbow, engineered a city ordinance to do away with slum conditions in Evansville. With alacrity the city council pigeonholed it. Mrs. Bacon rescued it, and finally it was made a part of the city building law. Then she began to look around; she began to write letters to everybody who could help, from the one hundred and fifty secretaries of Associated State Charities to Jacob A. Riis. All this in her own home and with a family to care for. At last her labor flowered; in January, 1909, her bill to alleviate tenement conditions was presented in the Indiana legislature. It attracted little attention, and was about to be shelved quietly, when Mrs. Bacon appeared in person before the legislature, and made such an eloquent plea for it that the bill was passed. One of her sentences became a battle cry. 'We protect men in mines and in railroads and in factories, but we do not protect them in their homes.'

"The bill covers the tenement question in a remarkable way. The tenement problem in a city of 25,000 demands entirely different handling from the tenement problem in a larger city. Mrs. Bacon's bill declares, for instance, that no tenement hereafter shall occupy more than 65 per cent of a lot, or more than 85 per cent of a corner lot, and that it must not be higher than once and a half times the width of the street, on which it stands. It also provides that the building must have a rear yard at least 15 feet deep, and that no rear tenements shall be erected. In the future, in every tenement erected in Indiana there must be one room of 120 square feet, while other rooms must contain at least 70 square feet of floor area, and must not be less than 9 feet high. Sanitary provisions are also arranged for.

# Bar Associations

A glance at topics discussed at recent Bar Association Meetings

**Criticised Executive Power.**—Judge Alton B. Parker, in an address before the New Hampshire Bar Association, on "The Lawyers' Opportunity for Patriotic Public Service," criticised the executive branch of the Federal government and claimed that of late that department had been seeking to augment its powers.

"By proclamation and other acts," said Judge Parker, "the executive power has been showing its impatience of the constitutional restraints, and its hostility to the department of the government which enforces them. Where are the chief executives of the states who are striving hard to preserve the home rule of their states, which the chief executive is seeking to take away?

"We have a chief executive in New York who is imbued with a belief in the necessity for such action, and endowed with courage to undertake it. But we are soon to lose him."

**Defense of Powers of Congress.**—Vigorous defense of the theory that the national government should regulate the issuance of stocks and bonds by interstate railroad corporations was made by Attorney General George W. Wickersham before the Illinois State Bar Association at its thirty-fourth annual convention.

"Congress assuredly may regulate and restrain the state corporation in the exercise of these powers (to issue securities), and may prohibit it from issuing obligations or stock for any purpose relating to interstate or foreign commerce, except in accordance with rules or restrictions prescribed by it for the purpose of preventing such evils as watered stock," said the Attorney General.

Reference was made by Mr. Wickersham to the condemnation, both by courts and economists, of the reckless issue of stocks and bonds by railroad companies without adequate consideration, which, he declared had come to be generally regarded as an evil, certainly as demoralizing in its effect on the public as the carriage of lottery tickets from one state to another.

The twenty years' period of railroad receiverships and foreclosures testified eloquently, he declared, to the practical effect of such unwarranted issues of securities upon the ability of railroad companies to properly perform their functions as instrumentalities of interstate commerce; while the utterance of stock for inadequate or fictitious consideration had furnished the opportunity for the most irresponsible and speculative control of these highways of commerce, and had resulted in the injury which always followed a control of property by those who had no real investment in it.

Such control, Mr. Wickersham continued, all experience demonstrated, would not be generally exercised in the interest of the road, and to insure the safe, conservative management necessary to meet the requirements of the public, and the proper discharge of the obligations imposed upon the carrier by law. On the contrary, it was almost inevitable that such control would be employed for purely speculative purposes, and to secure immediate profit to those in temporary control.

It was this public aspect which lent force to the conviction that "watered" and "bonus stock" was one of the greatest abuses connected with the management of corporations, and it was this effect upon the fitness of the carriers to perform their duties under national legislation that required and justified Federal supervision and control of the subject.

**Lawyerization of Courts.**—"The courts to-day are lawyerized," said President

Edgar A. Bancroft at the meeting of the Illinois State Bar Association. "Lawyers have so strenuously protested whenever the court has been a real factor in the conduct of a trial, and it resulted against them, that the judges are generally little more than mere moderators between contesting lawyers. . . .

"The strenuous character of modern business life shows itself in the temple of justice. Clients, as well as lawyers, regard litigation as a battle to be won at all hazards. How different from submitting with fairness the controversy, to be decided calmly by the court.

"A change, and an early change, is demanded, and will certainly come. If the bar does not meet the demand with skill and fairness, in the spirit of simplicity and directness, the change will come in another form, with the probability of creating as many evils as it cures. . . .

"There are two rules," continued Mr. Bancroft, "which seem to be fundamental: (a) The first and last word in all procedural improvement should be simplicity; (b) that no present method should be discarded because it is old, or supplanted with a different method merely because it is new. The old should remain, unless it is unnecessary or ineffective, or is supplemented with a better."

**Demand for Reformed Procedure.**—"Present methods of judicial procedure in Illinois are barbarous and farcical and a menace to widow and orphan."

"Some members of the Illinois bench think they are infallible, and their 'arrogance' is responsible for mistrials and the high cost of litigation."

"There are more miscarriages of justice in Illinois than in any other state."

These are some of the charges hurled back and forth in the evening sessions of the Illinois State Bar Association, in which one man, F. E. Burton, suggested that one way to hasten justice would be to appoint a business man to sit on the bench beside various judges, and give suggestions.

Justices of the Illinois supreme court, besides others from the supreme bench of Indiana, Wisconsin, and Michigan, were present, and the charges were bitterly contested, finally ending in a truce in which lawyers and judges agreed that in hearty co-operation lies the sole hope of remedying existing conditions.

It is encouraging to find the lawyers of Illinois taking up the subject of law reform. The men in charge of the programme of the Illinois Bar Association meeting have striven to direct discussion to the need of quicker and cheaper trials. The president of the association, Edgar A. Bancroft, in his opening address compared law procedure to medical practice, to the great disparagement of the former. He said: "It would be criminal malpractice to apply to a serious illness to-day the treatment of fifty years ago. In the profession of the law, in the strife-hospitals of the courts alone, are the antiquated methods, appliances, and standards still prevailing, substantially untouched by the spirit of modern life. Yet early attention to a legal dispute is sometimes as important as in a medical case. The immediate duty of finding the new and more efficient methods is upon the lawyers and the judges."

**Modern Murder Trials.**—In his address on "Justice Delayed is Justice Denied," delivered before the Iowa State Bar Association, ex-Governor C. S. Thomas of Colorado, vigorously criticised modern murder trials. He said: "The modern murder trial is a curious and startling evolution in 'the lawless science of the law.' The toleration of public sentiment toward the man who kills the spoiler of his home has ripened into a legal justification for homicide, and we now have the defense of 'the unwritten law.' It is but one of the many manifestations of a sort of legal insanity which frequently invests the modern murderer with complete immunity. If he can establish the suspicion of undue intimacy between the deceased and some member of his family, or prove any so-called eccentricity of his own or of an ancestor, immediate or remote, followed by any betrayal of excitement or the lack of it upon his part when the homicide was committed, which will enable his counsel to prepare a hypothetical question of ten thousand words, to be propounded to and answered by half a dozen medical gentlemen possessed

of many degrees, his chances of acquittal are more than even. . . .

"Nothing of human conduct is too absurd or too commonplace to be excluded from the hypothesis, and the defendant is solemnly declared by the expert to have been *non compos* when he killed his man, because at the time he was calm, collected, indifferent, and deliberate, or because he was impulsive, excited, passionate, and revengeful. The same facts determine experts for the defense to one conclusion, which commit those for the prosecution to its opposite. And these displays of scientific balderdash, converting court rooms into show rooms, to which crowds throng for amusement and diversion, lengthen into weeks and months, burden the public treasury with enormous expense, frequently bankrupt and always tend to the protection of the offender. The case finally goes to a jury exhausted in body and bewildered by a fantastic medley of fact, fancy, and opinion, in which the homicide and its attendant circumstances are lost to the understanding. They acquit, or stumble upon some sort of compromise verdict, announce it, and thank God for their release from an imprisonment lasting longer than the term of an ordinary convict. These things be travesties upon justice, for which public opinion, rightly or wrongly, holds our profession largely responsible, and which must give way to saner and sounder methods, if the law is to perform its normal functions, and justice be speedily, effectually, and impartially administered."

**Too Many Statutes.**—The enactment of thousands of useless statutes every year, and the wide diversity of interpretation of the laws by judges, are engendering contempt for law on the part of the public, according to Samuel Kalisch, retiring president of the New Jersey State Bar Association, whose annual address was upon the "Administration of the Law as the Laymen See Us." He pleaded for a return to the great principles of the common or civil law, which he declared are the only principles which give absolute liberty and justice to the common people. President Kalisch, in his condemnation of the many useless enactments placed on the statute books every year, insisted that a halt in the plethora of law-making would also halt the growing suspicion on the part of the people that special interests have too much influence in the formation of the statutes.

"The bane and stumbling block to the progress of the common law have been and still are the statutory laws," he said. "Many of the statutes which have been passed ostensibly for the purpose of aiding the common law have succeeded rather in dimming its great principles, under which only real liberty can be secured."

The retiring president declared his belief that the greatest liberty ever enjoyed by the English people was under the proper enforcement of the common law, which granted equal rights to everybody. He blamed the dark portion of English history on the tortures inflicted on accused persons to extort confessions under the statutes made to override the common law, and declared that the uprising for Magna Charta was caused only by the desire of the people to return to the right to invoke the common-law principles.

## *Reading the Briefs*

BY BILL BARRISTER.

When the lawyer grows uproarious
  In a lengthy, windy talk,
And his logic seems laborious
  And their Honors rise and walk,
Conferring with each other;
  Ah! he feels a rising grief
When the judges say, My brother,
  We have read your printed brief.

When the lawyer in disgust is,
  And his hopes receive a shock
As he sees the high Chief Justice
Looking sidelong at the clock,
Still he feels he'll have an inning,
  And indulges the belief
There's a chance that he'll be winning
  Since the court has read his brief

# Law Schools

Gleanings from addresses to graduates

**Shepard's Advice to Young Lawyers.**—Edward M. Shepard advised the members of the New York Law School graduating class to make the impression upon their clients of being loyal, devoted, and diligent. "Be very respectful to small business," said he, "for you may be entertaining angels unawares,—that is to say, clients who may bring you fees beyond the dreams of avarice."

"The question arises," he continued, "Shall a lawyer help a client violate the law? If a client comes to you, saying that he meditates breaking into a house and committing a burglary, and you help him, then you deserve the same punishment as the burglar. And the same thing is true in regard to a lawyer who helps a corporation break the law. But," he added, "it is no uncommon thing that a corporation or an individual wishes to do an innocent thing that in one way is lawful and in another is not. Then it is the duty of the lawyer to find out what is permitted by law. So while we are not to assist in things unlawful, it is for us to interpret law for our clients, and show them what is lawful in a case where one way of doing a thing may be lawful, and another way illegal."

**Believe in Your Case.**—Secretary Nagel, of the Department of Commerce and Labor, in his speech to the graduating class of the Law Department of Georgetown University, urged that the right side of a legal proposition is a bigger consideration than a client's fee. "We are too ready to believe that we have a right to take any case. I do not subscribe to that. It is not necessary to accept the rule that a lawyer can take any case, but there is one rule that we can accept, and that is, Don't take a case for a fee unless you believe in the case."

**What Not To Do.**—George A. Carpenter judge of the United States district court, in an address at the annual banquet of the Alumni Association of the Northwestern University Law School, sidestepped a toast, "The Lawyer as He Appears to the Judge," and announced that he would describe "the lawyer as he ought to appear to the judge."

Judge Carpenter condemned a growing idea that the purpose of the courts is to act as an umpire in the battle of wits between opposing attorneys, deciding in favor of the one whose preparation is most complete, and warned attorneys not to do the following things:

Appear in court without suitable preparation. Cases often are lost because the attorney is familiar only with his own side of the case.

Lean confidentially over the bench, and speak on personal matters to the judge. The conversation is usually only about the weather, but it looks bad to the spectators, and might even influence a careful judge against the lawyer.

Forget the dignity of the court, or indulge in personalities with opposing counsel.

Quote some authority to the court, and omit some essential feature, merely because it might influence the jury against your particular case.

**Unselfish Public Service.**—"The work of government," said Governor Herbert S. Hadley, in his address before the Indiana University School of Law, "has but seldom been regarded as the special duty of those who were best qualified to perform it. The result has been that those who have made and executed our laws have often looked to public office as a source of private reward, and not for the purpose of unselfish public service.

"Public life in America to-day needs no parlor politicians or idle theorists to discourse upon our theories of government. It does need men of courage and education and ability to do in a practical

way all that can be done to promote the cause of good government. It does need men of education, courage, and ability, who will discharge the duties of public office as they would perform the duties of a private trust. . . .

"I do not indulge in quixotic hope that we can ever secure the perfection of public or private morals, or entirely eradicate dishonesty, trickery, and illegality from our public service, or from any other department of human activity or thought. But I do believe that, through the influences of our colleges and our universities, there can be brought to our public life that one essential of efficient, disinterested public service, the absence of which has caused the fall of every nation that has gone to its decline through evils that come from within, and not from without."

**Taught for Twenty-Five Years.** — With the completion of this semester's work, says the Ann Arbor News, Professor Jerome Cyril Knowlton rounded out exactly a quarter of a century as a teacher of "contracts" in the Law Department of the University. When an inquisitive reporter said: "My, that's a long time to teach one subject!" the professor replied, "It's a big subject."

Professor Knowlton is the idol of the first year law men, and throughout all their three years' work, "Jerry" as he is lovingly called by every law student, holds a place peculiarly his own in their affections. He is witty, and the wit is spontaneous. One time,—this was during the good old days, when hazing was a part of the course a student took, in whatever department he entered,—there was a group of junior laws on the campus, and they had a freshman just from the plains of the golden West, and they were insisting that the freshman climb a tree. This was in broad daylight.

The freshman was stubborn, was ready to fight, and he whipped out a six shooter, and allowed that the first man who laid a hand on him was going to get plunked full of holes. He looked as though he meant it, too. Someone rushed to Professor Knowlton, who was at that time the dean of the department, and told of the threatened shooting, and Professor Knowlton went to the balcony of the building.

"Hi, there!" said he to the westerner with the gun, "if you don't look out you'll shoot a hole clean through your diploma."

The gun was put away, the wit appreciated by both the freshman and his tormenters, and they all walked off together in the direction of "Joe's."

**Independence of the Bar.** —"The Lawyer's duty," said Judge Frank S. Roby, in his address before the graduates of the Indianapolis College of Law, "is to enforce the law, not to subvert or defeat it. The independence of the bar, as well as that of its members, is not limited. The lawyer must be his own man. The lawyer who permits another to order him hither and yon forfeits his right to the name. I hope each of you will have many corporate clients, never your masters. A lawyer is one thing, an employee another. Have as many railroad clients as you can, but never allow a railroad company or anyone else to put you on a level with a section man. Go to the legislature with your own recommendations and advice, if you wish to do so, but do not go because you are sent. The lawyer may defend the criminal, but he cannot, as a lawyer, connive to violate the law. He has no better right to devise methods by which to steal coal fields than he has to devise methods for stealing horses."

**College Trained Lawyers.**—The college trained lawyer will solve the great legal and economic questions of govern- this and the next generation, in the opinion of Attorney General Wickersham, as expressed in an address on "The Relation of Legal Education to Governmental Problems," delivered before the Harvard Law School Association. "He will not be the man whose only acquaintance with the principles of law and government has been derived from text-books and lectures,—such a man would not be equipped to cope with them," he said. "He must be the man who has found the 'living law' as it has been developed in the real transactions of men. Except with possible rare exceptions, the day of the plodding student who read his Black-

stone in a desultory, unmethodical, interrupted fashion from the musty shelves of some practising counselor, is over. . . .

"The college trained lawyer of this and the coming generations, who will solve the problems of government," he continued, "is the man who has mastered the principles and doctrines of law as a science, through the selection, classification, and analysis of adjudged cases involving their application."

The Attorney General predicted that the lawyer who obtains those qualifications will be the man who can successfully cope with the great questions which will be presented for solution with the growth and expansion of this country.

**Bench and Bar.**—"If there is a friend," said Judge H. B. Tuthill, to the graduates of the Valparaiso University Law School, "whom the lawyers always have, it is the judge. Listen to him, not for the sake of listening, but examine minutely every word he says. If the judge asks a question, it may be to suggest a way out of your difficulty, to give you a cue which, if followed, will avert the impending disaster. . . .

"Remember that there is no difference between big cases and small ones; you have no right to go into court unprepared. Time is precious in a court room, and the judge can't stop to dig down into a law book on every point; he must decide quickly. Always be ready to help the court by being thoroughly prepared. Every judge always has a few lawyers on whom he leans. Why? Because he has tried them out time and again, and found that they are always prepared and have all the facts at their finger tips. Their opinions are right in the majority of cases, and the judge accepts them without question. This is one of the greatest rewards of the lawyer. If it is not worth working for, then nothing is. If you expect the judge to be friendly with you, be friendly with him. It does not pay to try to trip up the court. You may do it once, but you never will again."

**Must Work and Work.**—"It is an old saying," said Supreme Court Justice William J. Carr, in addressing the Brooklyn Law School graduates, "that it is more easy to give advice than to practise it. Men differ much in conduct, but agree largely in counsels. There is little that I can say which is not commonplace to you. Still, a platitude has its purpose. In a large sense, all the concepts of ethics and law are platitudes. He would be, indeed, a most remarkable man, who would give us any truly original thoughts on these subjects, and their value would be likely to be in inverse proportion to their originality. You are about to start out on a career which is peculiarly arduous. You have adopted a profession which but a few men can master in its details. Even an average skill can be got only by never ending work. As men you must live, as well as learn, and the bread and butter problem will be as keen to you as to any others. . . .

"It has been said that the chances of success at the bar are increased by poverty and struggle at the beginning. You will recall the anecdote of the great English judge who was asked by a kind father what would best enable his son to succeed at the bar, and who answered: "Cut him off with a shilling." Some of you will recall the story about that most glorious advocate, Erskine. After the great trial in court which first disclosed his gigantic powers of advocacy, he was asked what influences had inspired him to the deed. He answered, "I felt my little children tugging at my gown for bread. . . .

"These instances are but typical, not only of the profession of the law, but of all forms of active life in this land. It is the rule that from narrow means and hard beginnings come forth the men who fill large places in public or private life. All of you wish to succeed, and there is but one rule for success for you. That is to work and work, and, above all, to live honestly."

# Recent Articles in Law Journals and Reviews

**Animals.**

"Cruelty to Animals."—74 Justice of the Peace, 278.

**Arbitration.**

"A Court of Justice for the Nations."—17 Case and Comment, 53.

**Attorneys.**

"Attorneys' Liens."—21 Bench and Bar, 94.

**Bankruptcy.**

"Bankruptcy Law, Its History and Purpose."—44 American Law Review, 394.

**Baseball.**

"Baseball Jurisprudence."—44 American Law Review, 374.

**Bœotian League.**

"The Bœotian League."—25 Political Science Quarterly, 271.

**Brown.**

"The Trial of John Brown."—44 American Law Review, 405.

**Commerce.**

"The Power of Commerce to Regulate Commerce."—25 Political Science Quarterly, 220.

**Conflict of Laws.**

"The Individual Liability of Stockholders and the Conflict of Laws."—10 Columbia Law Review, 520.

**Constitutional Law.**

"The Making of the Constitution."—44 American Law Review, 341.

"The Three Departments of Government."—42 Chicago Legal News, 354.

"Effect of Overruling Opinion of Court of Last Resort on Rights Acquired on Opinion Overruled."—40 National Corporation Reporter, 633.

"The Income Tax Amendment."—25 Political Science Quarterly, 193.

"Inherent Improprieties in the Income Tax Amendment to the Federal Constitution."—19 Yale Law Journal, 505.

"Statutory Regulation of Trades and Professions."—3 Lawyer & Banker, 174.

**Contracts.**

"Validity of a Contract between All the Stockholders of a Corporation for the Control of the Board of Directors."—19 Yale Law Journal, 656.

"Are Executory Contracts of Marriage Which are Not to be Performed within One Year, within the Statute of Frauds?"—70 Central Law Journal, 425.

**Corporations.**

"*Ultra Vires* Acts of Corporations."—40 National Corporation Reporter, 596.

**Courts.**

"Jurisdiction of Courts in Cases of Injury to Real Property."—19 Yale Law Journal, 577.

**Criminal Law.**

"Undefended Prisoners."—74 Justice of the Peace, 266.

"The Pardoning Power."—19 Yale Law Journal, 603.

**Damages.**

"The Measure of Recovery upon Implied and Quasi Contracts."—19 Yale Law Journal, 609.

**Declaration of Independence.**

"The Declaration of Independence: What it Meant in 1776, and What it Means in 1910."—17 Case and Comment, 55.

**District of Columbia.**

"The Constitutional Status of the District of Columbia."—25 Political Science Quarterly, 257.

**Divorce.**

"The Law and Procedure in Divorce."—44 American Law Review, 321.

**Flag.**
"The Law and the Flag."—17 Case and Comment, 68.

**Food.**
"Unsound Meat and Compensation."—74 Justice of the Peace, 301.

**French Revolution.**
"Economic Aspects of the French Revolution."—25 Political Science Quarterly, 328.

**Homicide.**
"Malice Aforethought, in Definition of Murder."—19 Yale Law Journal, 639.

**Insurance.**
"Suicide and Life Insurance."—22 Green Bag, 329.

**Judgment.**
"The Conclusiveness of Judgments against Corporations on Their Members in Assessment Proceedings."—19 Yale Law Journal, 533.

**Jurisprudence.**
"The Next Great Step in Jurisprudence."—42 Chicago Legal News, 336; 19 Yale Law Journal, 485.
"The Ethical Basis of Jurisprudence."—19 Yale Law Journal, 564.

**Labor Organizations.**
"Payment of Labor Representatives in the British House of Commons."—25 Political Science Quarterly, 317.

**Legal Fictions.**
"The Reasons for Some Legal Fictions."—8 Michigan Law Review, 623.

**Mandamus.**
"Mandamus Commanding Inspectors of Elections to Count Votes Excluded by Misunderstanding of Election Law."—19 Yale Law Journal, 580.

**Morocco.**
"European Intervention in Morocco."—19 Yale Law Journal, 549.

**Mortgage.**
"Rights and Remedies of General Creditors of Mortgaged Railways."—19 Yale Law Journal, 622.

**Negligence.**
"Right of Action for Injuries Due to the Explosion of Fireworks."—17 Case and Comment, 58.
"The Supply of Dangerous Articles."—74 Justice of the Peace, 302.

**Oath.**
"A Justice's Oaths, Ancient and Modern."—74 Justice of the Peace, 254, 267.

**Payment.**
"The Defense of Payment under Code Procedure."—19 Yale Law Journal, 647.

**Political Parties.**
"The British Labor Party in 1910."—25 Political Science Quarterly, 297.

**Powers.**
"Computation of the Period of Suspension under an Instrument in Execution of a Power."—10 Columbia Law Review, 495.

**Shipping.**
"The Harter Act and Its Limitations."—8 Michigan Law Review, 637.

**Taxes.**
"How Shall We be Taxed."—40 National Corporation Reporter, 561.
"The Rating of Woodlands."—74 Justice of the Peace, 254.
"The Budget and the Assessment of Licensed Premises."—74 Justice of the Peace, 289.

**Trademarks.**
"The Unwary Purchaser: A Study in the Psychology of Trademark Infringement."—8 Michigan Law Review, 613.

**Uniform Legislation.**
"Uniform Laws and Court Procedure."—3 Lawyer & Banker, 165.

**Waters.**
"Local Authorities and the Pollution of Rivers by Sewage."—74 Justice of the Peace, 277, 290.
"Public Control of Irrigation."—10 Columbia Law Review, 506.

**Wills.**
"Public Interest in Probate of Will. (Reimbursement to executor for expenses incurred in endeavoring in good faith to secure probate of worthless will.)"—40 National Corporation Reporter, 561.

**Witnesses.**
"Art in Direct Examination."—17 Case and Comment, 61.

# New Law Books

**"The Law of Intoxicating Liquors."** —By Howard C. Joyce. (Matthew Bender & Company) Buckram. $7.50.

This work treats exhaustively the laws regulating the manufacture and sale of intoxicating liquors. It aims rather to present that law as it stands to-day, then to consider the expediency of the various measures proposed, or to compare their relative value and benefit. There is a valuable discussion of the constitutionality of various statutes. Such topics as prohibition, the taxing and licensing of the traffic, enactments generally of a regulative and restrictive character as to the conduct of the traffic, search and seizure laws, local option laws, civil damage statutes, and prosecutions for offenses, are fully treated. The author's style is clear and pointed, and the notes are apt and concise. The book is attractively printed, and will prove of practical value to those interested in the subject, either from a sociological or a legal standpoint.

**Beecher's "Contracts in Michigan."** With forms. $4.50.

**Downing's "United States Customs Tariff."** 2d ed. $2.

**"New Code of International Law."** By Jerome Internoscia. Published in three languages (three columns on a page), English, French, and Italian. 1 vol. $12.

**"Secret Liens and Reputed Ownership."** By Abram I. Elkus and Garrard Glenn. Buckram, $3.50.

**"The Law of Real Estate Agency."** By William Slee Walker. Buckram, $6.

# Lawyers as State Officers

THE inequality before the law of those unable to employ the best legal talent, and the excessive zeal of well-paid attorneys in behalf of rich clients, are among the most serious charges brought against the prevalent mode of administering justice.

A remedy for this state of affairs is being agitated. "If when the courts were established," says the Kansas City Star, "lawyers had been made officers of the state, attached to the courts by salaries, any propaganda for detaching lawyers from the court, and making it possible for the wealthy to employ good lawyers, while the poor could not afford to go to court at all,—any such propaganda would be regarded as involving the rankest injustice. It would be scoffed at or ignored. Everybody would see the fact clearly, then, that lawyers are as essential a part of the court machinery as are the judges. In other words, one part of justice, the service of the judge, is free,—paid for by the state; the other element, the service of attorneys, is a question of barter and sale. And one cannot get justice in the courts without a lawyer, any more than without a judge. . . . Except possibly in a justice's court, which does not keep a record, a man cannot go into one of the people's courts, unless he is represented by a lawyer. That means that a lawyer is as much an integral part of the administration of justice as the judge is. The idea that a litigant would hire his own judge would be shocking,—because we are not used to it. The idea that one could hire his own lawyer would be shocking, too, if we were not used to it."

This suggestion is not likely to receive serious consideration, for some time at least. If the courts were absolutely free, lawsuits would likely become the main occupation of those litigiously minded. Nor is it at all certain that salaried attorneys would render as efficient service as those who must now maintain their professional reputation in the face of keen competition.

If all lawyers were officers of the state, their number would necessarily be restricted, and the profession of the law, which has for centuries been the arena of honorable ambition, would become the lucrative prerogative of a privileged class.

# Quaint and Curious

Odd legal incidents gleaned from modern chronicles

**Directed Congregation to Pray.**—Judge Davis, in the circuit court held at Gallatin, Missouri, sentenced a whole congregation to pray for sixty days, and held up his decision in the "Jamesport Church Trial" until the petitions were answered.

The church got into the courts through a suit instituted by one faction of the congregation against another over the observance of the "Social Hour" on Sundays. This hour is one set apart for prayers, the reading of the Bible, mutual exhortations, and, when a minister was present, a sermon.

The plaintiffs demanded that when the minister was present, the time from 11 o'clock to 12 o'clock be given over to his sermon. The defendants insisted that this necessarily would exclude the customary social worship at that hour.

At the close of the testimony Judge Davis said to the court stenographer "Do not take this," and then struck the desk with his gavel and said: "For forty hours I have listened to the testimony in this case. Everybody else connected with the case, attorneys, evangelists, parties, and witnesses have talked, but me. Now, I have something to say,—I want every member of the Jamesport congregation to stand up. It makes no difference which side you are on." Then, when they had stood up, he continued:

"I want all of you who do not believe in the efficacy of prayer to sit down." And of course it is unnecessary to say that nobody sat down. The judge then continued:

"I have heard of everything else in this case except prayer, and I believe it would be a mighty good thing for you people to spend the next sixty days in prayers to God, and in earnest and sincere effort to get together. It is the most remarkable case I ever heard of; there does not seem to be any substantial difference between you. I think it would be better if parties were a little more yielding."

**Is "Affinity" a Libelous Word?**—It was decided recently by the appellate division of the supreme court that the term "affinity" is a good old English word, and is not in itself libelous.

The decision was rendered in the case of Peter Geddes Grant, a broker, who obtained a verdict for $15,000 against a newspaper that described him riding in a touring car with an "affinity." A new trial was ordered.

In his charge to the jury the trial judge said:

"Of course, this word 'affinity' is one newly introduced into our language. It is not more than a few years old, at most, in the invidious sense in which it is now commonly used. You, of course, will have in mind, in passing upon just what was the meaning, what the ordinarily intelligent person would gather from the article. As you have perhaps heard me say in the course of argument with counsel, if the word were used now, I should charge you that it had an invidious meaning, but then it was newly coined."

In the decision of the appellate division, written by Justice Clarke, the court said:

"The defendant excepted to that part of the charge in which the court stated that the word 'affinity' now has an invidious sense as it is now commonly used, and that if it were used now it would have an invidious meaning.

"The word 'affinity' is a common English word, to be found in all English dictionaries, and in none of them to which our attention has been called is there ascribed the particular invidious meaning sought to be ascribed to the word upon this trial. Dictionary meanings, however, are not conclusive. English is not a dead, but a virile language, flexible, progressive, continually being enriched from all sorts of sources, its common speech made piquant and interesting by slang and jargon, often better understood by the man

in the street than the classic diction of its great masters.

"If, as claimed by the plaintiff, and apparently conceded by the court, a new meaning had been attached to or coined for the word 'affinity' shortly prior to the publication of the article complained of, that meaning should have been set forth in the complaint, and a special issue tendered thereof. There was no special picking out (in the complaint) of the word 'affinity,' nor was any meaning attributed thereto."

It was contended during the trial that a new and invidious meaning had been given to the word "affinity" by the publication of the articles in the newspapers of doings of Ferdinand Penney Earle, and articles published in the newspapers concerning Earle were admitted in evidence by the trial justice.

**Six Cats, a Parrot, and a Dog.**—Six cats, a parrot and a dog caused the separation of Valentine Yankofski and his wife; and Judge Williams, in the Superior Court at Winsted, Connecticut, granted Yankofski a divorce on the ground of desertion. Yankofski testified that his wife took her playful pets to bed with her, and when a feline raced up and down his back he kicked with foot and tongue too. She was bound she would sleep with her pets, he testified. One night, when he was tired and had retired, she came to bed with a dog and two cats. One cat, he said, began running back and forth over him from the head to foot. He kicked the cat off the bed, and his wife told him if he hurt that he was hurting her.

Yankofski said he told her he did not marry cats and dogs, but was willing to furnish her with a home and bed.

Judge Case asked John Platt, a witness, how much of a menagerie Mrs. Yankofski had when he did chores there, and the witness replied there were enough of them,—five or six cats, a parrot, and a female dog.

**A Prophetic Dream.**—The following is the actual experience of a member of the Los Angeles Bar: One morning a few years ago I jokingly remarked to my family at the breakfast table that I must be going to be retained in some new probate matter, as I had had during the night a peculiar dream of the dead. Being pressed for particulars by an inquisitive daughter, I related the following:

In my dream I had been approached by my sister, who had stated to me that a very rich man, a stranger to us, had died, and if we were to get any of his money we would have "to dig it out," since he had "taken it all with him to the grave." I agreed to help her, and we thereupon procured picks and shovels, proceeded to the newly made grave, and began to dig. Our efforts from the start were well rewarded. We encountered money with every shovelful of dirt we turned. Money, money, money, paper money, silver money, gold money. Verily had he been rich, and verily had he "taken it with him to the grave." We continued our digging until we encountered the box containing the casket, which we opened. Here occurred the most vivid part of the dream; for the emaciated, cadaverous face of the unknown dead fixed its horrible image so indelibly upon my mind and memory that I shall be able to recall it for many a year. Taking out what money there was in the coffin we replaced the lid, closed the box, filled up the grave, took our money, and—I woke up. Now, of course, anybody might dream anything at any time, but what followed was certainly not a dream.

Upon my arriving at my office that morning, I was told by my clerk that a Mrs. S. had been frantically trying to get in communication with me over the telephone, and had left her number, with urgent instructions for me to call her as soon as I came in. I did not know Mrs. S. She was not a client of mine, and never had been, and, so far as I or the office force was concerned, we had never heard of her. However, I immediately called upon the number she had left. It developed that she was not acquainted with me, but had been recommended to a lawyer by my name, and she had made a mistake and gotten the wrong lawyer. She insisted, however, that her needs of an attorney were so desperate that, since I was a member of the bar, if I could only come to her at once it made no dif-

ference if I was a stranger. She gave me her address and I hurried to her home, which proved to be a palatial residence in the most select part of the city.

Answering the door bell in person, she hastily explained that her husband was at the point of death, and unless he made a new will, which he greatly desired to do, all of the estate would be lost to her and her daughter. I told her to take me to him at once, whereupon she opened some sliding doors, parted a heavy pair of rich portieres, and we stepped into a very dark bed chamber. The outline of the man on the bed was barely discernible, and I groped around to the window at the head of the bed, and threw up the blind, letting a stream of sunshine fall across his form. I took one look, and all but gasped aloud, for there on the bed, staring up into my eyes, was the selfsame, identical, emaciated, cadaverous face of the unknown man in the coffin. Recovering myself, I called for pen and paper, and hurriedly drew the will, and upon his signing the same, and the affixing of the signature of the nurse and myself as witnesses, he died.

The estate proved rich, but greatly tangled and involved, and while the amount realized for fees was large, I surely had to "dig it out."

**Waste by a Life Tenant.**—A curious law case, that of a man fighting for the ownership of his skeleton, has just been concluded at Stockholm. Twenty years ago Albert Vystroem signed a contract with the Royal Swedish Institute of Anatomy, making over his body after death to the institution, in return for a sum of money. Since then he has come into possession of a fortune, and he was anxious to cancel his contract. The matter was brought before the courts. Not only was the case decided against him, but he was even ordered to pay damages to the institute for having extracted two teeth without its authorization, which was held to be, in point of law, a breach of contract.

**A Matter of Punctuation.**—In People ex rel. Krulish v. Fornes, 175 N. Y. 114, 67 N. E. 216, O'Brien J., says: "A change in punctuation is frequently as material and significant as a change in words. It is related of an eminent member of the British House of Commons, that once in the heat of debate he called one of his fellow members a scoundrel. This was held unparliamentary language, and the speaker, or perhaps the House, ruled that the offending member must apologize, and the latter submitted to the decision, and tendered the apology in these words, without punctuation: 'I called the honorable gentleman a scoundrel it is true and I am sorry for it.' It is plain that this sentence might convey either one of two meanings, one utterly the reverse of the other, depending entirely upon the punctuation. Punctuated in one way it would mean this: 'It is true that I called the honorable gentleman a scoundrel, and I am sorry that I did.' Punctuated in another way it would mean this: 'I called the honorable gentleman a scoundrel, it is true that he is a scoundrel, and I am sorry that he is one.' The meaning first mentioned was the one which the House evidently adopted. The last one would only add insult to injury, and would be a gross contempt of the House."

**The Higher Law.**—In a certain county in Florida the criminal docket of the circuit court, opposite the name of a party charged with murder, contains the following entry: "Defendant hung March 10th, 1910. This case stands transferred to the Court of Heaven."

This is grim humor; but as a pointed recognition of a great truth, it is not without value. It impresses upon us the fact that while religion and morality embrace both time and eternity in their mighty grasp, human laws reach not beyond the boundaries of time. Jurisprudence regards men only as members of civil society. It assists to conduct them from the cradle to the grave, as social beings, and there it leaves them to their final judge.

This entry recalls the thrilling words of the patriot Jacob Milborne, executed in New York in 1691, on a charge of treason of which he was subsequently declared innocent by the British Parliament. He cried from the scaffold to one of his persecutors: "Robert Livingston, I will implead thee at the bar of Heaven for this deed."

# Judges and Lawyers

A contemporary record of notable men

# John W. Daniel

## Jurist and Statesman

The death of Senator John Warwick Daniel removes the oldest of the Democratic Senators in point of service. Of the entire list, he was the only one who could be said to belong to the old regimé. And as he was the oldest in service, he was one of the most conspicuous in popular favor.

For the past few years he had remained in the background. His health had not been good, and he was not heard often in the Senate. But previous to this period he spoke frequently, and enjoyed a high reputation as an orator. In those earlier days his speeches were the signal for the gathering of large audiences, and by many as an orator he was ranked with Voorhees, Ingalls, Wolcott, and Vest.

A man of extensive reading, liberal education, and retentive memory, he commanded a voluminous vocabulary. He spoke fluently and with ease, and seemed never at a loss for something pertinent to say. He was a strong advocate of free silver coinage, and took a prominent part in the debates connected with the silver legislation of the nineties.

Entering the Confederate Army as second lieutenant in the Eleventh Virginia Infantry of the "Stonewall Brigade," in May, 1861, he was wounded in the first battle of Manassas. After becoming adjutant of his regiment, Lieutenant Daniel was wounded at Boonsboro, Maryland; then he was promoted to be major and chief of staff of General Jubal A. Early, participating in the battles of Fredericksburg, Winchester, Gettysburg, Rappahannock Bridge, and Mine Run. In the battle of the Wilderness, on May 6, 1864, Major Daniel was struck by a rifle bullet, and so seriously crippled that he had to walk with crutches for the remainder of his life.

*Photo By Charles Parker, Washington, D. C.*

JOHN W. DANIEL

He was the author of "Daniel on Attachments" and "Daniel on Negotiable Instruments," two books which are classed as authorities.

In connection with the latter book the following story is told: He was lecturing on law at the Washington and Lee University, when a student arose and said: "I beg your pardon, Mr. Daniel, but may I ask a question?"

"Certainly."

"Well, sir, I would like to know how

many days of grace are allowed in this state?"

"Really," said Daniel, "I cannot recall at this moment, but if you will refer to my work on Negotiable Instruments you will ascertain. Now, young gentlemen, as I was saying—"

An interesting indication of his character was shown when he assumed personal debts of his father amounting to $100,000, for which there was no moral claim upon the son. He felt it his duty, however, to discharge them, and on his sixty-fifth birthday had the distinct pleasure of making the last payment.

For no personal trait was Senator Daniel more noteworthy than that of urbanity. Whether in private life or in his intercourse with his senatorial colleagues, his courtesy was unfailing. Even in the heat of debate, and often under provoking circumstances, he never failed to submit to interruptions, and to make polite response to inquiries and objections. His treatment of his friends was worthy of the best days of the Old Dominion.

Honorable Samuel Douglas McEnery, a Senator of the United States for the state of Louisiana, passed out of earthly life, at his home in New Orleans, on Tuesday, June 28. The Senator had reached home on Monday morning, having left Washington on Saturday night, immediately after the adjournment of Congress.

Twice governor of his state, subsequently a judge on its supreme bench,—a position which he resigned to accept a seat in the United States Senate, to which he was re-elected, and to which he would have continued to succeed had he lived longer,—it is not too much to say that there was in the state no public man more generally beloved than this noble old citizen.

He was a man of quiet disposition and habits, and delivered very few speeches in the Senate. Although in general a staunch Democrat, Senator McEnery frequently voted with the Republicans on tariff questions. He never missed a session of the Senate, and was a great stickler for its dignity and its time-worn traditions.

### Mississippi's Attorney General

HON. S. S. HUDSON

Honorable S. S. Hudson, of Vicksburg, Mississippi, was appointed Attorney General of the state by Governor Noel, on April 11th, 1910. Soon afterwards it became his duty to give an opinion as to the legality of the proposed Percy-Vardaman senatorial primary election, as asked for by them, and indorsed by joint resolution of the legislature.

After quoting section 3722 of the Code, which provides how primary elections for the nomination of United States Senators are to be held,—which is in effect that such primary can only be held during the year next preceding the assembling of the legislature that is to elect a Senator,—the Attorney General observed: "This is the law, and the state executive committee has no power to controvert its plain mandates; and its enactment is too obviously sensible for discussion. Evidently, the sense of the state was to have the United States Senator voted for at the same primary at which the legislature is to be elected; so when he, as the people's representative, voted for United States Senator, his will and vote would be controlled by and reflect the will of the people."

Quoting the statutes further, the Attorney General remarked: "Section 3721 of the Code of 1906 provides: 'The election of any party nominee, who shall be nominated otherwise than is herein provided, shall be void, and he shall not be entitled to hold the office to which he may have been elected. No political party shall be entitled to recognition as such unless it has made its nominations as herein provided.'

"Under this statute, should the election be held as contemplated in the concurrent resolution, it would be voluntary, without authority and sanctity of law, and without the official assistance of the primary election officers and machinery, and would therefore be conducted by unofficial or gratuitous help provided by the contending candidates to perform their various duties in the various precincts of the state, with no power to obtain and use the poll boxes, and without the legal power to get them, and with no power to command the constituted authorities to restrain and correct crimes, wrongs, and frauds, if any, perpetrated at the election."

Concluding, General Hudson said: "Doubtless Governor Vardaman and Senator Percy both prefer an early adjustment of the matter, but they and the desires of all other aspirants should be subservient and in obedience to the law, and to uphold its mandates, rather than set a precedent that would crush its beneficent effects."

General Hudson commenced the practice of law in Yazoo City, Mississippi, in 1890. The same year he was elected to the legislature from Yazoo county. In 1892 he resigned his seat in the legislature, and was elected, over four opponents, as district attorney of Jackson district, perhaps the most important district in the state. When his term expired, he moved to Vicksburg, Mississippi, and re-entered the private practice of the law, with one of the strongest bars of the state, and has to-day a large and lucrative law practice.

He has held under the different governors many appointments as special judge.

George L. Paxton, attorney of Red River, Taos county, New Mexico, died at Washington the day that the House concurred in the Senate statehood bill, for the signing of which Paxton furnished an eagle's quill from his home county, embellished with gold from the Red River mines.

California's Attorney General

ULYSSES S. WEBB

On June 14th, 1910, Honorable J. N. Gillett, Governor of California, addressed a letter to Attorney General Webb, in which he referred to the fact that while "sparring exhibitions," under certain conditions and restrictions, were permissible under the laws of the state, prize fights constituted a felony. The Governor continued: "It is claimed by many that the contest soon to take place between Jeffries and Johnson is to be a prize fight, as that term is understood in the law, and therefore a crime under our statutes. . . .

"If this is true, it should be prevented; but if carried out, the guilty parties should be punished by law. . . .

"I believe that you should investigate the matter, and take such legal steps as may be proper in your judgment, if warranted by the facts, in pressing the case to the court for its decision, and ask to have all interested parties enjoined pending the hearing. . . . If "sparring exhibitions," as permitted by our laws, means that fights where men are killed, beaten into insensibility, and their faces "cut to ribbons," are lawful acts, then it is time that the legislature should interfere and make such exhibitions or contests a felony."

On receipt of this communication, Attorney General Webb promptly pledged himself to stop the contest. He said: "The letter of the Governor is a positive and peremptory command, addressed to this office, to prevent the Jeffries-Johnson fight. The Governor states that the facts, as presented to him, show that the fight, if held, will be a prize fight, and that prize fights are prohibited by the laws of this state. This command the Governor has the right and power to

make, and it is the duty of this office to comply with it. I shall take such action as the law warrants to prevent the fight being held. It is the right of the office of the Governor to command; it is the duty of this office to obey. His instructions will be followed to the letter."

"The fact of the matter is," said the Attorney General, "that if this contest is one in which the contestants enter the ring with the avowed intention of knocking each other out, to use a fighting term, it is a prize fight and against the law. If they do not contemplate knocking each other out, I apprehend it is a 'fake,' and ought to be stopped."

This attitude on the part of the officers of the state drove the prize fight beyond its borders.

Ulysses S. Webb, was born at Flemington, West Virginia, September 29, 1864. In 1870 he removed with his parents to Kansas, in which state he was educated. He came to California in June, 1888, and engaged in the practice of law in 1889 at Quincy, Plumas county. He was elected district attorney of that county in 1890, and re-elected in 1892, 1896, and 1900, but resigned as district attorney in September, 1902, and was appointed Attorney General by Governor Gage September 15, 1902, to take the place of Tirey L. Ford, resigned. He was elected to the same office for the regular term November 4, 1902, and re-elected November 6, 1906.

Edmund Baxter, general counsel for the Associated Railroads of the South, in matters relating to interstate commerce, died at his summer home near Nashville, Tennessee. He was in his seventy-second year, and was a recognized authority on railroad and corporation law in general.

He was formerly counsel for the Louisville & Nashville Railroad in Tennessee, and was for several years a member of the faculty of the Law School of Vanderbilt University. He had been in failing health for a year or more.

He was generally regarded as one of the foremost lawyers of the United States. When Mr. Justice Stanley Matthews was on the United States Supreme Court bench, he said to a member of the Nashville bar one day, that he regarded Judge Baxter as one of the four or five really great lawyers that practised before that court, and that the Tennesseean was not inferior in learning or ability to any of the other three.

He used to tell with great relish of his first appearance before the Supreme Court of the United States, when yet a comparatively young man. Not knowing the rule of that august court, that the lawyer making an argument before it must appear in a Prince Albert coat, he was not the possessor of such a garment when the time came for him to appear before the court for the first time. A distinguished lawyer from an eastern state saw his predicament, and quickly changed coats with him. Judge Baxter was short of stature, and the other lawyer was tall. In consequence the long coat struck Judge Baxter around his shoe tops. However, in spite of this handicap in appearance, he made his usual forceful argument, and won his case.

Judge Baxter was thoroughly prepared in every case that he ever tried. He was laborious in preparation, going into the most minute details, and laying his foundations deep and solid. No contingency could arise in a case for which he was not prepared. As an advocate without verbal pyrotechnics of any kind, he was an unusually forceful and eloquent speaker. He spoke the purest, most eloquent English, and with a logic that was irrefutable, he drove home his successive points as did few lawyers.

Sydney Webster, who in his day was considered one of the ablest lawyers in the United States, and one of the foremost authorities on international law, died from paralysis at his home, in Newport. He was in his eighty-third year.

When the Electoral Commission of 1877 was appointed in the Tilden controversy, Mr. Webster was one of the lawyers who prepared the Tilden case.

Mr. Webster was the author of "Two Treaties of Paris and the Supreme Court," in 1901, and of many monographs on topics of international and constitutional law.

# The Humorous Side

A little nonsense now and then
Is relished by the best of men

**Artless Pleading.**—We have all heard "English as she is spoke." Closely allied to this is "Pleading as she is sometimes plead."

Strange as it may seem, there are lawyers so illy prepared for the practice of their profession, that the pleadings prepared and filed by them are a mere travesty of this important branch of the law, and calculated to reduce legal proceedings to the level of comic opera. We present herewith two curious petitions, copies of which were sent us:

Circuit Court

Plaintiff's Petition.
E—— E——
V. S.
Illinois, Centeral, Rail, Road, Companney, Defendant.
The Plaintiff's states the defendant is a Corperation Doing business in this state authorized to sue and be suid by said corperate name Illinois, Centeral Rail Road Company, that it did by its agents and servents detective on or about Mar or Apr, 1903 Arrest or have arrested and imprision ther son E. P., who is only Eighteen Years of Age, Charging him with Larceney, Says the same was don without provocation or cause for the lone purpose to deter parties from doing the company A rong, Says on acount of same the minor E. P. has bin slandered in the some of one Thousand Dollars And for the suffering in boddy and mind, on account of said imprision,
Plaintiff therefore prays for a Judgement For one Thousand Dollars and all other Relief,

Circuit Court

R. N. C. Plaintiff,
V. S. )——.( Petition
Illinois, Centeral, Rail, Road, Co, Defendant,
The Plaintiff R. N. C., State that the Defendant Illinois Centeral, Rail, Road, Companey, is a Corporation Doing business in this state, authorized to sue and be suid by said Corporate Name Illinois Centeral Rail, Road, Co,
That on or about 24.th Day of Dece, 1902 said Companey, by its agents and servents stoped and lay a train of cars across the main street in D, for 30 minits says this plaintiff, had important business on the opsite side of said st from wher he was, after a docktor. says and his only way to get to wher he was, was to cross over said train except to go a long distence, which he did not have time,
says while said train was standing still he made a effort to cross over the train, and said defendant without warning started to runn said said train and in doing so jurked this Plaintiff, casing him to fall of the train, brakeing his arme, says he is cripeled for life not abel to labor on account of said act as complained of in his damage in the some of Six Thousan, Dollars, Plaintiff therefore prays for A Judgemente fo Six Thousan Dollars and all other Relief,

**There's When.**—Client. "Can a man's character be judged from his handwriting?"

Lawyer. "Yes, if his letters are read in court!"—London Opinion.

**Never Mind About Shakspeare.**—"You said you made a personal examination of the premises," interrupted the rural magistrate. "What did you find?"

"Oh nothing of consequence," answered the witness. "A 'beggarly account of empty boxes,' as Shakspeare says."

"Never mind what Mr. Shakspeare said," rejoined the R. M. "He will be summoned to testify for himself, if he knows anything about the case."—Chicago News.

**An Unfriendly Act.**—Two neighboring farmers became involved in a quarrel over a spring which started upon the land of one of them and flowed across the highway onto the land of the other. Finally the matter got into court. Both of the litigants had been very friendly with a certain physician, but since the quarrel one of them seemed to lose his friendship for the doctor. At last the doctor had an opportunity to meet this farmer, and asked him: "Why is it, Bill, that you are down on me? I don't know that I have done you any harm, or anything that should have changed your friendship for me. "What," exclaimed Bill, "You have not done me any harm? If you had let that fellow who lives across the road die two years ago when everybody had given him up, instead of curing him, I would not have this trouble now. Is that not enough to do to an honest farmer?"

**Known by Its Fruits** —Said a New Mexican attorney to his youthful apprentice: "John, what do you understand by a freehold estate?"

"A frijole state," answered John, "is one which raises a large number of beans."

**Indissoluble Marriages.** —A South Dakota J. P. is in the habit of ending his marriage ceremonies as follows: *"What this court has joined together let no other court put asunder."*

**New England English.** —Complaint was made to a landed proprietor by one of his employees, that boys who were swimming in a pond were causing quite a nuisance. The owner of the property gave the man the privilege of putting up a sign, as he had asked permission to do. The notice read as follows:

"No Loffing of Swimming on Theas Growns—Order by———. If Catched Law Will be Forced."—Berkshire Courier.

**The Conservation Movement.** —There lately happened to be in the office of Allen Wood, the Indianapolis lawyer, two of his friends named Heywood and Greenwood. A client who knew all the men present came in and asked facetiously: "Are you trying to form an association of all the varieties of your family?" "What!" exclaimed Wood, "haven't you heard of the national movement for the conservation of the Woods?"

**Must Deliver the Goods.**—A motion for a new trial was made before Judge R. B. Albertson, of Seattle, Washington, in the supreme court of King county, in an action upon an agreement calling for the delivery of thirty barrels of whisky, all but five of which had been destroyed. The court, after reviewing the testimony, became seemingly impatient, and, with a Mark Twain twinkle in his eye, concluded: "I am unalterably opposed to any man being obliged to pay for whisky until he gets it."

**Strenuous Devotion to Principle.**—A lawbook dealer recently received an order from a country patron, who ordered a well-known book, and wrote this: "Will you please forward me a copy of the above-named book at once. Do not send one bound in sheep, because I am a vegetarian."

**The Rolling Stock was Safe.**—A lawyer wrote a letter to a railroad yard clerk, asking that employment be given a client, who had just served a thirty-day jail sentence for larcency. The yard clerk made this annotation on the letter: "He's a h—— of a thief, but we've hired him just the same, for he won't steal a train."

**Much Governed.**—"Why do you call up at this box, my man?"

"To learn what new laws have been passed since I went on duty," answered the policeman.

**An Exhaustive Hypothesis.**—"Well, I began my thirty-thousand-word hypothetical question today."

"Seems to me that will exhaust you. Who'll make the closing argument?"

"My son. He starts law school next week. He ought to be graduated by the time I finish."—Louisville Courier-Journal.